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No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SALEM BLUE COLLAR WORKERS ASSOCIATION
and STEPHEN SCULL,
Petitioners,

v.

THE CITY OF SALEM and MAYOR AND
COMMON COUNCIL OF THE CITY OF SALEM, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

JAMES KATZ
Counsel of Record
TOMAR, SIMONOFF, ADOURIAN
& O'BRIEN
41 South Haddon Avenue
Haddonfield, New Jersey 08033
(609) 429-1100
Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the Court of Appeals erred when it established a *per se* rule that invidious discrimination against out-of-state residents seeking access to public employment is absolutely immune from scrutiny under the Privileges and Immunities Clause of Article IV of the United States Constitution, on the grounds that public, unlike private employment, is neither a right nor a privilege protected by the Clause.

PARTIES TO THE PROCEEDING

In addition to the parties listed on the cover, respondents include Leon Johnson, the current Mayor of the City of Salem and current Salem Common Council members John Burke, Robert Davis, Robert Elk, Irene Collier, Robert Johnson, Dennis Bundy, Joseph Weaver, and Earl Gage. The foregoing individuals along with Council members Betsy Erhardt and Donald Sharp, instead of Irene Collier and Joseph Weaver, were listed in the caption before the Court of Appeals, and were members of the Salem Common Council at the time the Complaint was filed. As of January 1, 1995, the Mayor for the City of Salem will be Earl Gage and members of the Salem Common Council will be John Burke, Robert Davis, Robert Elk, Irene Collier, Charles Sullivan, Robert Johnson, Dennis Bundy, and Joseph Weaver.

Petitioners are the Salem Blue Collar Workers Association and Stephen Scull.

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PETITION FOR WRIT OF CERTIORARI

Salem Blue Collar Workers Association and Stephen Scull respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered on August 25, 1994.

OPINIONS BELOW

The opinion and order of the United States District Court for the District of New Jersey (26a, 56a)[1] is reported at 832 F. Supp. 852 (D.N.J. 1993). The opinion of a divided panel and the judgment of the United States

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[1] As used herein, "a" refers to the Appendix to this Petition. "J.A." refers to the Joint Appendix filed with the Third Circuit.

Court of Appeals for the Third Circuit (1a, 58a) issued August 25, 1994 and is reported at 33 F.3d 265 (3d Cir. 1994). The order of the Court of Appeals denying the petition for rehearing and rehearing in banc is unreported (52a).

JURISDICTION

The judgment of the Court of Appeals as to which review is sought was entered on August 25, 1994 (1a, 58a). A timely petition for rehearing and rehearing in banc was denied on September 28, 1994 (52a). This petition is being filed within 90 days of September 28, 1994. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

United States Constitution, Article IV, § 2, Cl. 1:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The ordinance of the City of Salem whose constitutional review is sought is set forth in its entirety at 54a.

STATEMENT OF THE CASE

Petitioner Salem Blue Collar Workers Association ("Assocation") is a labor organization representing clerical and blue collar workers employed by the City of Salem, New Jersey. The Association is comprised of members who reside in the City of Salem, persons who reside in New Jersey but outside the City of Salem and persons who reside outside the State of New Jersey. In addition, other members of the Association may be willing to reside outside the State of New Jersey but for the City's residency ordinance (J.A. 162-163). Petitioner Stephen Scull was hired by the City as a permanent laborer on November 20, 1989 and could only be terminated for just cause (J.A. 30; 46; 159). Respondent City of Salem is a mu-

nicipal corporation and a public entity in the State of New Jersey. The Mayor and Common Council manage, control and govern the property, finances and affairs of the City (J.A. 30).

The Salem residency ordinance was enacted in 1978 and provides that

> all full-time permanent and full-time, part-time officers and employees . . . employed by the City of Salem are . . . required as a condition of their employment to have their place of abode in the City of Salem and be a bona fide domiciliary therein. (54a-55a).

The ordinance has been interpreted by the City to apply only to those hired or appointed after its effective date, thus "grandfathering" individuals previously employed by the City who lived elsewhere. The Mayor and Common Council may waive the ordinance "for good and sufficient cause" where residence outside of the City is required due to the health of the employee, the nature of the employment, or where "specialized talent or technique is required, such as professional services of engineers or accountants." (55a).

The ordinance further requires that as "a condition of employment, each and every employee or prospective employee shall be required to execute an affidavit, in [a] form prescribed by the Mayor and Common Council, setting forth . . . that [the] employee is domiciled in the City" (55a-56a). An employee who is not a resident is to be given "a ten (10) day notice setting forth the charge that the employee is not a bonafide resident" and therefore will be discharged (56a).

Since the ordinance's adoption in 1978, the City of Salem has taken essentially no steps to enforce it. The City has not terminated any employees for failure to comply with it (28a). The ordinance was never discussed or negotiated with the Association. and there is

no reference to it in the parties' collective bargaining agreement (28a) (J.A. 89-90; 163; 165; 167).

The Mayor and Common Council have never promulgated an affidavit for city workers regarding residency nor required any employee or prospective employee to execute such an affidavit, as provided for in the ordinance (28a) (J.A. 78; 90-91; 159-160; 164; 167-168). There is nothing on the City's standard employment application which indicates that all employees are required to be municipal residents. The City provides nothing in writing to any new employee prior to hire that indicates that employment is conditioned upon municipal residency, and no supervisor has ever been instructed to inform employees about the City's residency ordinance (28a) (J.A. 90-91; 105; 109; 167-168).

Although all blue collar and clerical employees are subjected to this residency ordinance, most of the other local governmental employees and municipal supervisory personnel are exempt. The City's police officers, firefighters, and public school teachers are exempted from the ordinance by operation of state law.[2] Additionally, numerous skilled and management personnel have been informally exempted from the ordinance; but none of these employees have sought or received official waivers from the Mayor and/or Common Council (28a).[3]

Neither at the time of its passage or since has the City of Salem obtained any evidence that its residency ordinance has furthered any of its stated goals, resulted in any

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[2] *See e.g.*, N.J.S.A. 40A:14-122.1 (precluding imposition of municipal residency ordinances on police officers); N.J.S.A. 40A:14-9.1 (firefighters); N.J.S.A. 18A:26-1.1 (teachers).

[3] It is undisputed that the City Treasurer, Engineer, Construction Code Official, Superintendent of Schools, Superintendent of Water and Sewerage Department, Financial Officer, Judge, Municipal Attorney and Prosecutor are not required to live in Salem nor have they ever sought waivers under the residency ordinance.

economic help to the City, or provided any benefits which would not have accrued in the absence of its adoption (J.A. 75-77; 82-85; 102; 108; 130-131). The City admits that it has no facts which demonstrate that persons residing outside of New Jersey are responsible for Salem's economic problems, or that out-of-state residents constitute a peculiar source of the evil at which its residency ordinace is aimed (J.A. 77-78; 83; 85).

When Stephen Scull was hired in 1989, he was a resident of Salem. However, he was not asked to sign an affidavit evidencing that he was a municipal resident, nor was he informed by any City official of Salem's residency requirement. Subsequently, while still employed, Mr. Scull relocated from Salem because of concern for the health and safety of his children (29a).

On January 31, 1992, Kenneth Homan, Superintendent of the Salem Water and Sewerage Department, who is not nor required to be a Salem resident, indicated that because Mr. Scull was residing outside the City, he was in violation of the municipal residency ordinance. Mr. Scull was informed that he had thirty days in which to correct the violation, at which time termination proceedings would commence.[4]

On March 9, 1992, the Salem Blue Collar Workers Association filed an Unfair Practice Charge and an Order to Show Cause with the New Jersey Public Employment Relations Commission, contending that the City of Salem violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4(a)(1) and (5) by implementing its residency ordinance without bargaining in good faith with the Association. On March 17, 1992, pursuant to 42 U.S.C. § 1983 and the Declaratory Judgment

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[4] **Although Stephen Scull, a laborer, is required to live in the City or risk losing his job, neither the Supervisor seeking his termination, the City Administrator overseeing the ordinance, or the municipal attorney enforcing the ordinance are Salem residents.**

Act, 28 U.S.C. § 2201, the Association and Stephen Scull filed suit in the United States District Court for the District of New Jersey, alleging that Salem's residency ordinance was violative of the Privileges and Immunities Clause of Article IV, § 2, and that the ordinance's multiple exemptions contravened the Fourteenth Amendment of the United States Constitution.[5] On September 13, 1993, on cross-motions for summary judgment, the District Court granted the City's and denied plaintiffs' motion, dismissing the Complaint in its entirety (26a, 51a).

On appeal, a divided panel of the Court of Appeals for the Third Circuit affirmed (1a). The panel recognized that the decisions from this Court have repeatedly invalidated, on Privileges and Immunities Clause grounds, any prohibition of the right of nonresidents to ply their trades or businesses (6a-7a). However, the majority ruled that public employment is not a "privilege" protected by the Privileges and Immunities Clause and that exclusion of out-of-state residents from access to public as opposed to private employment is therefore immune from scrutiny under the Clause (6a-11a).[6]

In her dissent, Chief Judge Sloviter stressed that the cases from this Court do not establish "an unwavering distinction between public and private employment" (17a) and do not evidence an intention that the scrutiny of the

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[5] On April 9, 1992, the City of Salem agreed to be temporarily restrained from disciplining Stephen Scull or any other member of the Association for any violation of the residency ordinance until further order of the New Jersey Public Employment Relations Commission. The Commission stayed any action on the Unfair Practice Charge pending the outcome of plaintiffs' constitutional challenge. This stay was lifted subsequent to the decision by the Court of Appeals.

[6] Although admittedly replete with exemptions, loopholes, and a record of non-enforcement, both the trial Court and the Third Circuit held that the City's residency ordinance is not violative of the Fourteenth Amendment (11a-15a; 42a-50a).

Privileges and Immunities Clause is limited only to the denial of access to private employment (18a-23a). Judge Sloviter reiterated that application of the Privileges and Immunities Clause to Salem's residency requirement does not necessarily invalidate the ordinance, but requires a court then to determine whether there is a legitimate justification for the discrimination against non-residents.

> The majority's analysis pretermits that inquiry. The result is that a substantial number of jobs will be permanently foreclosed from out-of-state residents for what may be insubstantial reasons. This is a result that I believe is incompatible under the Privileges and Immunities Clause (23a).[7]

REASONS FOR GRANTING THE WRIT

By establishing a *per se* rule that the protections of the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution are inapplicable to invidious discrimination against out-of-state residents seeking access to public employment, a divided panel of the Court of Appeals (5a-11a), over the dissent of Chief Judge Sloviter (17a-23a), has significantly eroded the guarantees accorded by the Clause. The lower Court's decision creates an arbitrary distinction between public and private rights, concluding that only statutes that burden private but not public employment are subject to scrutiny.

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[7] Judge Sloviter also noted that the cumulative effect of the various exemptions to Salem's ordinance "throw[s] into question the rationality of the scheme" and she was "troubled by the allegation that the residency requirement lay dormant until applied against appellant Stephen Scull when he questioned the conduct of a volunteer firefighter at the scene of a fire." (24a). Nonetheless, because she believed "that this is an appropriate case for decision of the still undecided question of the applicability of the Privileges and Immunities Clause to public employment," she rested her position that the order of the District Court should be reversed on that ground alone (24a-25a).

This unprecedented ruling has far-reaching consequences. First, denial of access to public employment, one of the largest sectors of the economy, has been arbitrarily eliminated from the purview of the Clause. Second, this decision promotes further expansion of residency requirements and other parochial obstacles which undermine the goals of interstate harmony and economic growth. Finally, the lower Court's rational is particularly destructive because it applies not only to public employment, but immunizes from scrutiny discrimination practiced by governmental entities against out-of-state residents in the direct distribution of any goods and services.

The decision below fatally weakens the protections of the Privileges and Immunities Clause and invites the very type of retaliatory conduct which the Clause was adopted to prevent. Neither the language, policies, or anti-discrimination principles underlying the Privileges and Immunities Clause support the arbitrary distinction created by the divided panel's decision in this case.

I. NEITHER THE LANGUAGE, POLICIES, OR PURPOSES OF THE PRIVILEGES AND IMMUNITIES CLAUSE SUPPORT THE LOWER COURT'S ARBITRARY DISTINCTION BETWEEN PUBLIC AND PRIVATE EMPLOYMENT AND ITS CONCLUSION THAT AN OUT-OF-STATE RESIDENT'S DENIAL OF ACCESS TO PUBLIC EMPLOYMENT IS IMMUNE FROM SCRUTINY.

The Privileges and Immunities Clause of Article IV, § 2 provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Intended "to help fuse into one Nation a collection of independent sovereign States," *Toomer v. Witsell*, 334 U.S. 385, 395 (1948), the Clause "establishes a norm of comity," *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975), "that is to prevail among the States with respect to their treatment of each other's residents." *Hicklin v. Orbeck*, 437 U.S. 518, 523-24 (1978). The provi-

sion "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer*, 334 U.S. at 395.

In protecting both individual rights to non-discriminatory treatment and promoting the structural balance essential to the concept of federalism, the Privileges and Immunities Clause makes nonresidence an improper basis for imposing a special burden. *Austin*, 420 U.S. at 662. This Court has relied upon the Privileges and Immunities Clause to invalidate state statutes which place unreasonable burdens on out-of-state citizens and whose sole basis for classification is place of residency.[8]

Nonetheless, the Third Circuit concluded that to deny out-of-state residents access to public employment is never

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[8] *See e.g., Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1871) (Maryland statute requiring only nonresident merchants to obtain licenses to practice their trade, charging nonresidents higher license fees than Maryland merchants, and placing restrictions of the use of merchants from using nonresident salesmen); *Toomer v. Witsell* (South Carolina statute obligating nonresidents to pay one hundred times more for commercial shrimp license than residents); *Mullaney v. Anderson*, 342 U.S. 415 (1952) (statute of Territory of Alaska charging nonresidents forty-five dollars more for commercial fishing licenses than residents); *Doe v. Bolton*, 410 U.S. 179 (1973) (Georgia statute prohibiting abortions performed on out-of-state residents); *Austin v. New Hampshire* (State commuter income tax imposed only on incomes of nonresidents who work in state); *Hicklin v. Orbeck* (Alaskan statute requiring all contracts in connection with the construction of oil and gas pipelines to give preference in hiring state residents); *United Building & Construction Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208 (1984) (Camden ordinance establishing as a goal that at least 40 percent of the employees on any construction project funded in whole or in part with City funds must be Camden residents); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) (New Hampshire's residency requirement for admission to the bar); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) (Virginia's residency requirement for admission to the bar, without examination, of lawyer admitted to practice in another state).

subject to scrutiny under the Privileges and Immunities Clause. It reached this result without any analysis of the language or purposes animating the Clause.

Unlike other constitutional provisions which are narrowly circumscribed, the Privileges and Immunities Clause contains no such limitation. Rather, its language grants affirmative protection to out-of-state residents against invidious discrimination by specifying that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Article IV, § 2, cl. 1. Nothing therein supports the lower Court's holding that a distinction is to be drawn between access to economic opportunities in the private rather than public sector. *See, e.g., Bolton*, 410 U.S. at 200 (1973) (invalidates restriction on access of out-of-state residents to medical care in both public and private hospitals).

The ruling of the Court of Appeals is inconsistent with the Clause's historical antecedents. Although not extensive, the available evidence of the framers' intent in drafting the Privileges and Immunities Clause indicates it was adopted as an instrument of national unification.[9] Derived from the Fourth Article of the Articles of Confederation, the Clause was designed to help fashion a single nation, by eradicating the discrimination by states against "outlanders" which characterized the period of the Confederation. *Austin*, 420 U.S. at 660-61 (citations omitted).[10]

Despite this historical focus on eliminating discrimination between the states, the Court of Appeals makes the

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[9] Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 Univ. of Pa. L. Rev. 379, 383 (1979) (hereinafter *"Discrimination"*).

[10] The internecine warfare between the states which led to the Federal Constitutional Convention of 1787 is familiar to every reader of history and needs no detailed description here. *See* Bancroft, *History of the Formation of the Constitution* (1882); Fiske, *The Critical Period of American History* (1888); Nevins, *The American States During and After the Revolution 1775-1789* (1924); Warren, *The Making of the Constitution* (1937).

bold assertion that since the Privilege and Immunities Clause "traces its origin to the language employed in the Fourth Article of the Articles of Confederation [and t]hat Article used terms that were referable to private employment, *e.g.*, 'trade' and 'commerce,' " this evidences that the Clause meant to distinguish between public and private employment (8a). Such a novel theory is seriously flawed.

First, the language of the Clause is not narrowly limited but is an affirmative guarantee to out-of-state residents against invidious discrimination, belying the lower Court's artificial distinction.[11] Second, the fact that the Articles of Confederation explicitly delineated trade and commerce,[12] whereas the Privileges and Immunities Clause provided unrestricted protection to out-of-state residents, evidences that the framers were concerned with eradicating discrimination which undermined the Union, rather than limiting the Clause to selectedly enumerated common callings. Third, under the Third Circuit's "literalist" ap-

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[11] It is not surprising that the majority cited no original sources in support of this theory. The three law review articles it referenced (8a-9a), are wholly irrelevant to the claim that the Clause was enacted only to protect private rather than public sector employment. On the contrary, a number of recent commentators have argued that the Clause applies equally to discrimination involving public and private sector employment. *See e.g.*, W.Z. Hirsch, D. Floyd, *The Substantial Reason Requirement Under the Privileges and Immunities Clause: The Case of Residency Laws*, 15 S.W. Univ. L. Rev. 431, 445-448 (1986); Simson, *Discrimination*, 128 Univ. of Pa. L. Rev. at 392-395.

[12] The Fourth Article of the Articles of Confederation provided:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free ciitzens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively. [19 *Journals of the Continental Congress* 214-15 (G. Hunt ed. 1912)].

proach to constitutional interpretation, the Privileges and Immunities Clause should be equally inapplicable to municipal enactments since they are also omitted from its provisions, but such a narrow approach has been rejected by this Court. *United Building and Construction Trades*, 465 U.S. at 215. Finally, the fact that eighteenth century America was characterized by concerns over trade and commerce and public employment was virtually nonexistent, by no means evidences that the Privileges and Immunities Clause was intended to protect only designated occupations.[13]

This disparity between protections afforded public and private employment is at odds with the purposes animating the Clause. It was designed to minimize friction between the states and encourage interstate harmony. This Court has noted that "no [other] provision in the Constitution has tended so strongly to constitute the citizens of the United States one people." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869). As such, the Privileges and Immunities Clause should be equally inapplicable to municipal enactments since they are also omitted from its provisions, but such a narrow approach has been rejected by this Court. *United Building and oCnstruction Trades*, 465 U.S. at 215. Finally, the fact that eighteenth century America was characterized by concerns over trade and commerce and public employment was virtually nonexistent, by no means evidences that the Privileges and Immunities Clause was intended to protect only designated occupations.[13]

The decision below offers no reason why interstate harmony is disrupted any less when the discrimination is

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[13] Neither the case law nor the Articles of Confederation refer to the practice of law, medicine, driving a taxi cab, or operating as an insurance consultant, but the exclusion of nonresidents from these positions or services is equally violative of the Clause. *See e.g., Friedman*, 487 U.S. at 59 (law); *Bolton*, 410 U.S. at 200 (health services); *O'Reilly v. Board of Appeals for Montgomery County, Maryland*, 942 F.2d 281 (4th Cir. 1991) (taxi driver); *Silver v. Garcia*, 760 F.2d 33 (1st Cir. 1985) (insurance consultant).

effectuated by a municipality's direct prohibition on employment rather than a city's indirect restraint on employment practices of private parties. This artificial distinction contravenes the antidiscrimination principles which are at the heart of the guarantees accorded by the Clause. Courts have repeatedly recognized that the Clause bars discrimination against out-of-state residents based solely upon their place of residence. *See e.g., Hicklin*, 437 U.S. at 525; *Toomer*, 334 U.S. at 396 ("[i]t does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States"); *Paul*, 75 U.S. (8 Wall.) at 180 (The purpose of the Clause is "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.").

The Clause is a charter of personal rights, protecting individuals denied opportunities solely because of their place of residence. "[The] Clause embodied not a source of implied fundamental rights, but a federalism—based anti-discrimination principle." *Lutz v. City of York, P.A.*, 899 F.2d 255, 262 (3d Cir. 1990). To the individual excluded as a result of the invidious discrimination sanctioned by the Third Circuit's opinion, the injury is no less real because the deprivation is achieved directly by the City rather than indirectly by restricting the hiring decisions of others.

Rather than promoting interstate harmony, the danger of the Third Circuit's analysis is that it encourges internecine economic conflict. Both courts and commentators have recognized that the heightened protection accorded by the Privileges and Immunities Clause is necessary to protect nonresidents who are completely unrepresented in the decision-making body's legislative process, are political outsiders in the fullest sense, and would otherwise be encouraged to respond by enacting similar exclusionary measures against the offending state or municipality. However, " 'to prevent [retaliation] was one of the chief ends

sought to be accomplished by the adoption of the'" Clause. *See e.g., Austin,* 420 U.S. at 662-63 (1975) (citation omitted); *United Building & Construction Trades,* 465 U.S. at 217; Simson, *Discrimination,* 128 Univ. of Pa. L. Rev. at 384-385 (1979). These principles are no less compelling because an out-of-state resident is deprived of access to public rather than private employment.

The Third Circuit's analysis cavalierly ignores the vital role which the Privileges and Immunities Clause has played in protecting an out-of-state resident's access to employment. This Court decided "long ago . . . that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Toomer,* 334 U.S. at 396. The "pursuit of a common calling" has been repeatedly protected by the Clause and most of this Court's cases "expounding the Privileges and Immunities Clause have dealt with" employment related issues.[14] *United Building & Construction Trades,* 465

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[14] The courts have repeatedly invalidated efforts to impose restrictions on the employment opportunities of nonresidents. *See e.g., Ward v. Maryland,* 79 U.S. (12 Wall.) 418 (1871) (statute imposing on nonresident merchants greater licensing fees); *Toomer v. Witsell* (imposing increased fee on nonresidents to obtain commercial shrimp license); *Mullaney v. Anderson,* 342 U.S. 415 (1952) (statute of Territory of Alaska charging nonresidents forty-five dollars more for commercial licensing fees than residents); *Hicklin v. Orbeck,* 437 U.S. 518 (1978) (Alaskan statute requiring all contracts in connection with the construction of the Alaskan oil and gas pipelines to give hiring preference to Alaskan residents); *United Building & Construction Trades* (ordinance which limits 40% of city funded publics works jobs to municipal residents). We have been unable to locate a single case where a court has ever held that an exclusion of an out-of-state resident from employment does not violate the Privileges and Immunities Clause. In the only instance in the past two decades where this Court held that a particular activity (recreational elk hunting) was not a "privilege" protected by the Clause, the Court limited its holding by stressing

U.S. at 219. A person engaged in government service is involved in an activity that must be characterized as the pursuit of a common calling or a livelihood, and obtaining a position with a public entity is just as critical to an individual's economic well being as employment in the private sector.

"Like the occupations considered in the [Supreme Court's] earlier cases, [public employment is] important to the national economy." *Piper,* 470 U.S. at 281. As the dissent noted below, public employment is one of the fastest growing areas of the economy,[15] accounting for nearly one-fifth of all the positions in New Jersey and throughout the country (23a). In terms of its economic importance, it can hardly be doubted that government employment surpasses shrimp fishing, *Toomer v. Witsell,* commercial fishing, *Mullaney v. Anderson,* the trade of foreign goods, *Ward v. Maryland,* and the practice of law, *Supreme Court of Virginia v. Friedman,* occupations considered sufficiently vital to have warranted the Clause's protection.

The Third Circuit offers no reason why discrimination in government employment, one of the largest sectors of the economy, is immune from constitutional scrutiny. Both in numbers and significance, public employees provide many critical services which would otherwise be neglected. The public servant caring for the sick, the indigent, the infirm, and the very young "surely is as important to the maintenance or well being of the Union . . . as was the shrimp fisherman in *Toomer* or the pipeline worker in *Hicklin.*" *Piper,* 470 U.S. at 281-282 (citation omitted).

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that the activity was "recreation and a sport . . . [and] not a means to the nonresident's livelihood." *Baldwin v. Montana Fish and Game Commission,* 436 U.S. 371, 388 (1978).

[15] *Developments in the Law-Public Employment,* 97 Harv. L. Rev. 1611, 1614-1616 (1984).

The holding below creates the utterly irrational result that although a municipality may not restrict the hiring decisions of private parties contracting with the City, *United Building & Construction Trades,* it may blatantly refuse to hire out-of-state residents. A municipality is prohibited from indirect discrimination, but the lower Court's decision allows public entities to escape review under the Privileges and Immunities Clause by discriminating directly against nonresidents. "Such a formalistic construction would effectively write the clause out of the Constitution." *United Building & Construction Trades,* 465 U.S. at 217 n.9. "Constitutional rights would be of little value if they could be . . . indirectly denied," *Smith v. Allwright,* 321 U.S. 649, 664 (1944), or so "manipulated out of existence." *Gomillion v. Lightfoot,* 364 U.S. 339, 345 (1960).

The import of the Third Circuit's myopic view of the reach of the Privileges and Immunities Clause extends well beyond denial of access to public sector employment. Under its vision, the Privileges and Immunities Clause is equally inapplicable to any discrimination practiced against out-of-state residents in the direct distribution by the government of any goods and services. Such a result will unwittingly promote the proliferation of parochial barriers and further economic conflict between the states, which is inimical to the very principles underlying the Clause.

The Privileges and Immunities Clause was predicated upon a measured view of federalism, seeking to harmonize the goals of national unification, the integrity of individual States, and protection of out-of-state residents against discrimination for no reason other than their State of residence. The Third Circuit's circumscribed reading of the Clause upsets this balance. Neither the language nor logic of the Privileges and Immunities Clause supports the lower Court's conclusion that employment in the private rather

than the public sector is more worthy of constitutional protection.

II. THE THIRD CIRCUIT HAS MISTAKENLY RELIED UPON THIS COURT'S DECISION IN *UNITED BUILDINGS AND CONSTRUCTION TRADES COUNCIL* IN HOLDING THAT DENIAL OF ACCESS TO PUBLIC EMPLOYMENT IS NOT SUBJECT TO PRIVILEGES AND IMMUNITIES CLAUSE SCRUTINY.

Although virtually ignoring the principles underlying the Privileges and Immunities Clause and recognizing that this Court has never considered the applicability of the Clause to public employment, the majority infers based on *dicta* found in *United Building and Construction Trades* that this Court intended to establish an unwavering distinction between public and private employment (8a-10a). However, as the dissent explains (17a-22a), rather than providing the basis for a narrow ruling, *United Building & Construction Trades* "expanded the scope of the Privileges and Immunities Clause" (17a). The rigid disparity suggested by the Third Circuit does not follow from this Court's ruling in *United Building & Construction Trades.*

At issue therein was a Camden ordinance which established a goal that at least forty percent of the employees working on any construction project funded in whole or in part with City funds must be Camden residents. Camden contended that because the resident preference applied to positions which were funded by City monies, the impacted employees were, in effect, working for the City and the Privileges and Immunities Clause was therefore inapplicable.

In making this argument, Camden relied upon this Court's decision in *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 207 (1983), in

which a year earlier, this Court upheld an executive order of the Mayor of Boston, which was virtually identical to the Camden ordinance, and required that at least 50% of all jobs on construction projects funded with City funds be filled with *bona fide* Boston residents, was immune from scrutiny under the Commerce Clause, because Boston was acting as a market participant rather than as a market regulator. In *White*, this Court emphasized that "[e]veryone affected by the order is, in a substantial if informal sense, 'working for the City.'" *White*, 460 U.S. at 211, n.7. Therefore, the Court emphasized that, "when a State or local government enters the market as a participant, it is not subject to the restraints of the commerce clause." *White*, 460 U.S. at 208.

The holding in *White* turned on whether employees of contractors employed on City contracts could be seen as working for the City. Because this Court so held, Boston was considered a participant in the market for labor, as opposed to a regulator of private parties, and therefore the government's conduct was not subject to the restraints of the Commerce Clause. In *United Building & Construction Trades*, Camden argued that because "for purposes of the Privileges and Immunities everyone affected by the ordinance is also 'working for the City,'" the same analysis should apply, and Camden's conduct should not trigger scrutiny under the Clause. 465 U.S. at 219.

However, this Court rejected that view and held that under the Privileges and Immunities Clause, the distinction between a market participant and market regulator is irrelevant. Although the question of "whether employees . . . on public works projects were or were not, in some sense, working for the City" was critical to the analysis under the Commerce Clause, this Court opined that "the distinction between market participant and market regulator relied upon in *White* to dispose of the Commerce Clause challenge is not dispositive in this context. The two clauses have different aims and set different standards for State conduct." *Id.*, 465 U.S. at 220.

United Building and Construction Trades Court stressed that the distinction between public and private employment, which is important for Commerce Clause analysis, is not determinative of what conduct is subject to scrutiny under the Privileges and Immunities Clause. Whereas the Commerce Clause "acts as an implied restraint upon State regulatory powers," 465 U.S. at 220, the "Privileges and Immunities Clause . . . imposes a direct restraint on State action in the interests of interstate harmony." 465 U.S. at 220. Thus, "[i]t is discrimination against out-of-state residents on matters of fundamental concern which triggers the [Privileges and Immunities] Clause, not regulation affecting interstate commerce." 465 U.S. at 220.

United Building & Construction Trades recognized that while the fact that Camden was expending its own funds may be a factor in considering the Privileges and Immunities Clause challenge, "it does not remove the Camden ordinance completely from the purview of the Clause." 465 U.S. at 221. This is because a "determination of whether a privilege is 'fundamental' for purposes of that Clause does not depend on whether the employees of private contractors and subcontractors engaged in public works projects can or cannot be said to be 'working for the City.' " 465 U.S. at 221. Rather, the Court explained that any prohibition on such employment is subject to the Privileges and Immunities Clause even though the employees are "engaged in projects funded in whole or in part by the City." 465 U.S. at 221-222.[16]

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[16] The fact that this Court has held that there is no fundamental right to government employment under the Equal Protection Clause, *see e.g., Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (*per curiam*), or that a municipal residency ordinance does not violate the right to interstate travel, *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976) (*per curiam*), does not warrant a finding that the exclusion of out-of-state residents from municipal employment is immune from review under the Privileges and Immunities Clause. The Privileges and

Contrary to the lower Court's assertion (9a-10a), rather than supporting a restrictive view of the Privileges and Immunities Clause, the analysis in *United Building & Construction Trades* evidences an expansive reading of the Clause in three significant ways. First, this Court rejects the claim that the Clause applies only to state enactments. 465 U.S. at 215. Second, the Court finds the distinction between a market participant and market regulator constitutionally irrelevant to Privileges and Immunities Clause adjudication. 465 U.S. at 220-221. Third, although the Court notes (in a phrase that the Court below considers dispositive, 8a) that public employment "is qualitatively different from employment in the private sector" and is a "subspecies" of "common callings," 465 U.S. at 219, it concludes, as Chief Judge Sloviter suggests in her dissent below, "that notwithstanding the inapplicability of other Clauses of the Constitution to a municipal residency requirement, such a requirement trenches on the *raison-d'etre* of the Privileges and Immunities Clause" (22a).

By establishing a *per se* rule that a governmental entity may discriminate against nonresidents seeking positions directly with a public employer, but may not regulate

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Immunities Clause is not the Equal Protection Clause twice stated in the Constitution. It was designed to outlaw classifications based upon non-citizenship unless the discrimination against nonresidents bears a "substantial relationship to the particular evil they are said to present." *Hicklin*, 437 U.S. at 527. The Third Circuit recently recognized that analyses under the Equal Protection and Privileges and Immunities Clauses may lead to different results, when it held that although "the right to practice law is not a fundamental right for purposes of . . . equal protection analysis . . . it is considered fundamental for purposes of a Privileges and Immunities Clause analysis." *Shumacher v. Nix*, 965 F.2d 1262, 1268, n.9 (3d Cir. 1992). As Professor Tribe noted, if the contours of the Privileges and Immunities Clause were limited to protecting only those rights considered fundamental under the Equal Protection Clause, the guarantees of the Clause would be superfluous. Tribe, *American Constitutional Law* 535 (2d ed. 1988).

the hiring decisions of private parties, the Third Circuit is introducing into Privileges and Immunities Clause jurisprudence the market participant/regulator analysis essential to the Commerce Clause and previously held inapplicable to the Privileges and Immunities Clause. *United Building & Construction Trades*, 465 U.S. at 219-221. The lower court correctly notes (10a) that the Salem ordinance involves the City's direct hiring of public employees while *United Building & Construction Trades* concerned Camden's use of public funds to regulate the employment decisions of private parties contracting with the City. But it was this distinction between a market regulator and participant which this Court rejected in *United Building and Construction Trades*, and which the Third Circuit is now writing into the Privileges and Immunities Clause.[17]

When a municipality enters a market to procure services for its residents, it has two options: it can hire workers directly or, as in the case of *United Building & Construction Trades*, it can expend municipal funds to hire an independent contractor who will hire the employees. In either case, the work is done on city-designated projects, paid for by City funds, and controlled by City regulations. Since the predicate for a violation of the Privileges and Immunities Clause is discrimination against out-of-state residents, it is irrational that discrimination practiced directly

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[17] As the dissent below correctly observes:

> "Although the court [in *United Building & Construction Trades*] did indeed comment that [t]he opportunity to seek employment with [private contractors and subcontractors engaged in public works] is 'sufficiently basic to the livelihood of the Nation' . . . as to fall within the purview of the Privileges and Immunities Clause even though the contractors and subcontractors are themselves engaged in projects funded in whole or part by the city, *id.* at 221-22 (citation omitted), this does not signify that when faced with a direct employment issue, the Court would accept the distinction made by the majority." [22a].

by a municipality is immune from scrutiny, while discrimination practiced indirectly is invalidated.

The vision of the Privileges and Immunities Clause, to restrain State action which destroys interstate harmony, is blinded just as easily by actions a city takes as an employer as it is by a municipality's efforts to control hiring decisions of private parties. The scope which this Court gave to the Privileges and Immunities Clause in *United Building & Construction Trades* militates against adoption of the arbitrary rule which the lower court has suggested in this case.

III. THE LOWER COURT'S DISTINCTION BETWEEN PUBLIC AND PRIVATE EMPLOYMENT FOR PURPOSES OF PRIVILEGES AND IMMUNITIES CLAUSE PROTECTION IS INCONSISTENT WITH THIS COURT'S INTERPRETATION THAT PUBLIC OWNERSHIP OF ASSETS IS INSUFFICIENT JUSTIFICATION FOR DISCRIMINATION UNDER THE CLAUSE.

As the dissent below cogently notes (19a), and as the majority curiously omits, the distinction between public and private employment for purposes of Privileges and Immunities Clause scrutiny is wholly inconsistent with this Court's rejection of public ownership of assets as sufficient justification for discrimination under the Clause. In *Hicklin v. Orbeck*, Alaska sought to rationalize its preference for employing Alaskan residents in projects developing Alaskan oil and gas on the ground that "the oil and gas that are the subject of Alaska hire are *owned* by the State." 437 U.S. at 528. This Court rejected that contention, stating, "[w]e do not agree that the fact that a State owns a resource, of itself, completely removes a law concerning that resource from the prohibitions of the Clause." 437 U.S. at 528.

Consistent with its decision in *Hicklin*, in *United Building & Construction Trades*, this Court rejected the argument that the public ownership of the assets used for

municipal projects immunized the residency requirement from Privileges and Immunities Clause scrutiny, noting that in its earlier cases it had concluded "that the State's interest in controlling those things it claims to own is not absolute." 465 U.S. at 221. The Court continued,

> [m]uch the same analysis, we think is appropriate to a city's efforts to bias private employment decisions in favor of its residents on construction projects funded with public moneys. The fact that Camden is expending its own funds or funds it administers in accordance with the terms of a grant is certainly a factor—perhaps the crucial factor to be considered in evaluating whether the statute's discrimination violates the Privileges and Immunities Clause. *But it does not remove the Camden ordinance completely from the purview of the Clause* [465 U.S. at 22] (emphasis added).

For similar reasons, the fact that the City of Salem may be utilizing its funds may be a factor in determining whether its discriminatory hiring decisions violate the Privileges and Immunities Clause. But the arbitrary distinction between public and private employment should not, as the Third Circuit posits, remove Salem's ordinance from the purview of the Clause.

IV. RATHER THAN IMMUNIZED FROM REVIEW UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE, A MUNICIPAL RESIDENCY ORDINANCE SHOULD BE SUBJECTED TO SCRUTINY UNDER THE CLAUSE TO DETERMINE WHETHER THERE IS A SUBSTANTIAL REASON FOR ITS DISCRIMINATION AGAINST OUT-OF-STATE RESIDENTS AND A REASONABLE RELATIONSHIP BETWEEN THE MUNICIPALITY'S OBJECTIVES AND ITS DISCRIMINATORY CONDUCT.

As the majority and dissent recognize in the decision below (11a, n.6; 23a), scrutinizing a residency requirement under the Privileges and Immunities Clause would

not automatically invalidate it. Rather, the City of Salem and any other municipality could still enact such a restriction as long as it demonstrates that "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practice against non-residents bears a substantial relationship to the State's objective." *Piper*, 470 U.S. at 284; *United Building & Construction Trades*, 465 U.S. at 222; *Hicklin*, 437 U.S. at 525-526. "As part of any justification offered for the discriminating law, nonresidents must somehow be shown to 'constitute a peculiar source of the evil at which the statute is aimed.' " *United Building & Construction Trades*, 465 U.S. at 222; *Hicklin*, 437 U.S. at 525-526. The Clause bars discrimination against nonresidents only "when there is no substantial reason for the discrimination beyond the mere fact that [those excluded] are citizens of other States." *Toomer*, 344 U.S. at 396.

By subjecting denials of employment to the Privileges and Immunities Clause, the out-of-state resident is protected from invidious discrimination while a municipality, if it can demonstrate the rationality of its prohibition, still has the discretion to engage in exclusionary conduct. The Third Circuit's analysis eliminates this inquiry without logic or reason (23a). As a result, a substantial number of jobs are permanently foreclosed from out-of-state residents for what may be irrational grounds. This is utterly incompatible with the promise and protections of the Privileges and Immunities Clause.

CONCLUSION

The Privileges and Immunities Clause was adopted upon a principle that the people of the several states must sink or swim together and that hope is in union and not division. The lower Court's opinion denigrates the guarantees of the Clause by establishing a *per se* rule that invidious discrimination against nonresidents seeking access to public employment is immune from review. Petitioners do not believe that the Privilege and Immunities Clause is so impotent a guarantee that such blatant discrimination should remain wholly beyond its scrutiny.

For all of the foregoing reasons, petitioners respectfully request that the Court grant this petition for certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

JAMES KATZ
Counsel of Record
TOMAR, SIMONOFF, ADOURIAN
& O'BRIEN
41 South Haddon Avenue
Haddonfield, New Jersey 08033
(609) 429-1100
Attorneys for Petitioners

APPENDIX

Filed August 25, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5622

SALEM BLUE COLLAR WORKERS ASSOCIATION
and STEPHEN SCULL,
Appellants,

v.

CITY OF SALEM; LEON JOHNSON, Mayor of the City of Salem; JOHN BURKE, Common Council Member of the City of Salem; ROBERT DAVIS, Common Council Member of the City of Salem; ROBERT ELK, Common Council Member of the City of Salem; BETSY ERHARDT, Common Council Member of the City of Salem; EARL GAGE, Common Council Member of the City of Salem; ROBERT JOHNSON, Common Council Member of the City of Salem; DONALD SHARP, Common Council Member of the City of Salem; JOSEPH WEAVER, Common Council Member of the City of Salem, individually and in their official capacities,
Appellees.

Appeal from the United States District Court
for the District of New Jersey

D.C. Civil No. 92-1137

Argued May 2, 1994

BEFORE: SLOVITER, *Chief Judge,* HUTCHINSON and SEITZ, *Circuit Judges.*

Filed: August 25, 1994

OPINION OF THE COURT

SEITZ, *Circuit Judge.*

I.

Plaintiffs appeal a final order of the district court granting summary judgment to defendants in a civil rights action attacking the constitutionality of a city ordinance requiring employees of the city, with certain exceptions, to live therein. Our review is plenary.

II.

The individual plaintiff ("Scull") was employed by the City of Salem, New Jersey ("City") as a laborer. He moved his residence from the city to suburban New Jersey, giving as his reason the health, safety, and welfare of his family. He was notified that such action was in violation of the city's residential requirement and he would be terminated if he did not correct the situation. Scull would not comply and this action to bar his discharge followed.

Section 2 of the Salem Municipal Residency Ordinance recites that

> Except as otherwise provided by law, all full-time permanent and full-time, part-time officers and employees hereinafter to be employed by the City of Salem, are hereby required as a condition of their employment to have their place of abode in the City of Salem and be a bona fide domiciliary therein.

Joint Appendix ("JA") 38 (Ordinance #78-3).

The preamble to the ordinance cites the following reasons for the requirement:

> Whereas, said residency will not only reduce the high unemployment rate in the City, but will also improve relations among City employees; enhance the quality of employee performance by greater personal knowledge of conditions and problems in the City; promote a feeling of greater personal interest in the City's progress; reduce the possibility of tardiness and absenteeism; provide a ready availability of trained manpower for emergency situations; and provide unto the City economic benefits. . . .

JA 25.

Salem Blue Collar Workers Association ("Association"), the collective bargaining agent for the blue-collar and clerical employees of the City of Salem, and Scull filed a four-count complaint in the district court seeking, *inter alia,* declaratory and injunctive relief barring enforcement of the ordinance. They alleged that the ordinance violates the Privileges and Immunities Clause of Article IV, § 2 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The parties, then filed cross-motions for summary judgment. The district court held that the ordinance did not violate either constitutional provision and granted summary judgment to defendants. Plaintiffs' appeal followed.

III.

A. The Privileges and Immunities Clause

The Privileges and Immunities Clause of the United States Constitution provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2. The purpose of the Clause was to foster a national union by discouraging discrimination against residents of another

state on the basis of citizenship. *See Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869).

Despite the language of the Clause embracing "each State," the United States Supreme Court has recently held that the Clause may include municipal residency ordinances. *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 214-15 (1984). The Court's rationale for this expansive reading of the Clause is based on the relationship between the state and its municipality: since a municipality is granted its power to act from the state, it is as subject to the Clause as the state would be.

1. Standing

The district court granted summary judgment to the City on Scull's privileges and immunities claim because it concluded that he lacked standing. *Salem Blue Collar Workers Ass'n v. City of Salem*, 832 F. Supp. 852, 856 (D.N.J. 1993). In so concluding, the district court relied on language in the Supreme Court's opinion in the *Camden* case. There the Court stated that "[i]t is true that New Jersey citizens not residing in Camden will be affected by the ordinance as well as out-of-state citizens. And it is true that the disadvantaged New Jersey residents have no claim under the Privileges and Immunities Clause." *Id.* at 217 (citing *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74-75 (1872)). The implication from this language is that individual New Jersey residents have no standing to challenge a New Jersey municipal ordinance. The district court's ruling here is consistent with the Supreme Court's analysis in *Camden*. *Thus*, Scull lacked standing to assert a privileges and immunities claim.

In contrast to its ruling in regard to Scull, the district court concluded that the Association had standing on its privileges and immunities claim because the complaint alleged that the Association was comprised, *inter alia*, of

members who lived outside the State of New Jersey and others who might live outside the state but for the ordinance.[1] *Salem*, 832 F. Supp. at 856. The Court in *Camden* noted that one of the member associations that belonged to the Council in *Camden* had "at least some members who reside outside New Jersey," 465 U.S. at 212 n.4, and thus had standing. On that basis we agree with the district court's ruling on the Association's standing and proceed to its privileges and immunities claim.

2. Privileges and Immunities Clause Analysis

A valid privileges and Immunities claim requires proof of two elements: (1) whether the interest or right being burdened is "fundamental" and thus, protected by the Clause, *see The Slaughter-House Cases*, 83 U.S. at 76; and (2) if it is, whether there are "substantial" reasons for the discrimination and "whether the degree of discrimination bears a close relation to them." *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).

We first decide whether the right being burdened—direct public employment—is one that is "fundamental." As the Supreme Court stated in *Baldwin v. Fish & Game*

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[1] The district court reasoned that because the City did not challenge the allegation in its answer to plaintiffs' complaint, it is to be taken as true and thus the Association has standing. The City in its answer stated that it did not possess the knowledge or information to dispute the plaintiffs' allegation regarding the Association's claim to having out-of-state members. The City's answer to that allegation constitutes a denial under the Federal Rules of Civil Procedure. *See* F.R.C.P. 8(b) ("If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial."). However, plaintiffs did submit an affidavit from Mr. Paul Ledford, President of the Association, in which Mr. Ledford certified that the Association includes out-of-state members. JA 162-63 ¶ 3. As this matter was before the district court on summary judgment, the City could not rest on what amounted to a pleading denial to create an issue of material fact on the standing issue. Thus, the Association was entitled to prevail.

Commission, 436 U.S. 371 (1978), "[o]nly with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." *Id.* at 383. The Court's formulation of the controlling standard is but the beginning of analysis.

Up to this point in time, the Supreme Court has dealt only with prohibitions involving the practice of trades and businesses—private employment. *See, e.g., Supreme Court of N.H. v. Piper*, 470 U.S. 274 (1985) (the practice of law);[2] *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (occupations downstream from state-owned oil and gas interests); *Toomer v. Witsell*, 334 U.S. 385 (1948) (commercial shrimp fishing); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1871) (merchants); *cf. Baldwin*, 436 U.S. at 388 (rejecting argument that recreational moose hunting is a fundamental right deserving of the Clause's protection).

The focus of our analysis is on the proposition that the right to pursue a "common calling" is within the purview of the Privileges and Immunties Clause. *Hicklin v. Orbeck*, 437 U.S. at 524 (stating that the "protection of the Clause is strongly supported by this Court's decisions holding violative of the Clause state discrimination against

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[2] The Court in *Piper* rejected arguments that lawyers are not protected by the Clause holding, *inter alia*, that the " 'activities of lawyers play an important part in commercial intercourse.' " *Piper*, 470 U.S. at 281 (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975)). The *Piper* Court quoted Justice Bushrod Washington's opinion in *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3,230) (CCED Pa. 1825), in an attempt to define what "fundamental rights" are protected by the Clause:

> The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal . . . ."

Piper, 470 U.S. at 281 n.10 (quoting *Corfield*, 6 F. Cas. at 552).

nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State"); *Toomer*, 334 U.S. at 403 (commercial shrimping is within the scope of the Clause).

Because of the commercial nature of the term "common calling," early Court decisions looked to the Commerce Clause for guidance in their analyses, citing the "mutually reinforcing relationship between the Privileges and Immunities Clause of Article IV § 2, and the Commerce Clause." *Hicklin*, 437 U.S. at 524.[3] In *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983), the Court reviewed, under the Commerce Clause, the constitutionality of an executive order issued by the Mayor of Boston that required all construction projects funded in whole or in part by city funds to employ a work force at least half of whom were residents of the city. The Court held that the City was acting in a proprietary capacity and was a market participator, not a market regulator, and therefore was not in violation of the restraints of the Commerce Clause. It is significant to note that in dicta the Court said that the executive order affected the contractual relationship between the contractors and their employees, and as such, the employees were actually "working for the city." *Id.* at 211 n.7. Thus, they did not have the benefit of the Privileges and Immunities Clause when Boston favored its own citizens.

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[3] The Court noted that the origin of both clauses is found in the Fourth Article of the Articles of Confederation. In relevant part, that Article states:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states . . . shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce . . . .

Hicklin, 437 U.S. at 532 n.16.

In *Camden,* the Supreme Court came close to deciding the issue of whether public employment is a "fundamental" privilege protected by the Privileges and Immunities Clause. *Camden* involved a challenge to a city ordinance that required at least 40% of the employees of the contractors and subcontractors working on city projects to be Camden residents. The Court stated that the threshold determination was "whether an out-of-state resident's interest in employment on public works contracts in another State is sufficiently 'fundamental' to the promotion of interstate harmony so as to 'fall within the purview of the Privileges and Immunities Clause.'" *Camden,* 465 U.S. at 218 (quoting *Baldwin,* 436 U.S. at 388).

The Court refused to "mechanically" adopt the Commerce Clause analysis used in *White. Id.* at 219.[4] The Association contends that the Court's rejection of the *White* rationale signals a rejection of the public/private distinction in the area of employment. Closer scrutiny of the Court's reasoning in *Camden,* however, suggests otherwise.

Despite the Court's refusal to apply the *White* analysis, the public/private distinction survives as we read the *Camden* decision. *Camden* first stated that the pursuit of a common calling is a fundamental privilege protected by the Clause, *id.* at 219, but then drew a clear distinction between public and private employment by stating that "[p]ublic employment . . . is qualitatively different from employment in the private sector; it is a subspecies of the broader opportunity to pursue a common calling," *id.*

Although *Camden* refers to public employment as a "subspecies" of "common callings," the public/private distinction can be justified on the basis of the history of the language associated with the clauses. The Privileges and

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[4] The Court declined to address the merits of the privileges and immunities challenge in *White* because the lower court did not reach the issue. *Camden,* 465 U.S. at 214 n.7.

Immunities Clause traces its origin to the language employed in the Fourth Article of the Articles of Confederation. That Article used terms that were referable to private employment, *e.g.*, "trade" and "commerce." *See* David S. Bogen, *The Individual Liberties Within the Body of the Constitution: A Symposium: The Privileges and Immunities Clause of Article IV*, Case W. Res. L. Rev. 794, 831 (1987) (suggesting that "[d]espite uncertainty, one function of article IV . . . remained clear: it prohibited states from imposing any restriction not applicable to residents on nonresidents engaged in trade or commerce").

When the articles of the Constitution were drafted, the language of both the Privileges and Immunities Clause and the Commerce Clause was taken from the Fourth Article of the Articles of Confederation. It is on this historical basis that the distinction between public and private employment remains viable here. *See* Thomas H. Day, Note, *Hiring Preference Acts: Has the Supreme Court Rendered Them Violations of the Privileges and Immunities Clause?*, 54 Fordham L. Rev. 271, 278 (1985) (discussing the distinction the Court has drawn between private and government employment); *see also* Bogen, *supra* at 856 (stating that "[t]he right to engage in a trade or business is a privilege or immunity of citizenship"); Mark P. Gergen, *The Selfish State and the Market*, 66 Tex. L. Rev. 1097, 1129 (1988) (noting that early cases striking down state laws under the Privileges and Immunities Clause involved the "core privileges of trade and commerce").

Based on this historical foundation, we ask whether private or public employment is implicated by Scull's employment with the City of Salem. Our analysis turns on the nature of the employment relationship between employer and employee, not the character of the job being performed.

The Court in *Camden* held that a private employment relationship existed there. In *Camden* the contractors and

subcontractors were working under contract to the City and being paid in part or whole with city funds. *White* suggested that the employees of the contractors could be considered to be "working for the city" and therefore, have no claim. The *Camden* Court, however, refused to apply *White*'s Commerce Clause reasoning citing the employees' right to "seek employment with . . . *private employers*." *Id.* at 221 (emphasis added).[5]

Our case is distinguishable by comparing the direct and indirect nature of the government employment. The employment in our case is *directly* with the governmental entity—there is no intervening private employment as there was in *White*, where the contractors and subcontractors were under contract to the City of Boston, but the individual employees were under contract to the contractors and subcontractors. The *Camden* court recognized this distinction when it concluded that "[t]he opportunity to seek employment with such *private employers* is 'sufficiently basic to the livelihood of the Nation,' . . . as to fall within the purview of the Privileges and Immunities Clause even though the contractors and subcontractors are themselves engaged in projects funded in whole or part by the city." *Id.* at 222 (quoting *Baldwin*, 436 U.S. at 388).

We agree with the district court in this case that the public/private distinction has not been abandoned. Based on our reading of the Supreme Court cases in this area, we hold that direct public employment is not a privilege or fundamental right protected by the Privileges and Immunities Clause of Article Four.

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[5] As the district court correctly noted, the Court's holding in *Camden* that there was private employment is "consistent with the Court's view that the Commerce Clause focuses on the perspective of the state or local government while the Privileges and Immunities Clause focuses on the perspective of the individual." 832 F. Supp. at 860 n.4; *see generally* Bogen, *The Privileges and Immunities Clause, supra.*

In light of our holding that there is no fundamental right implicated here, it is unnecessary for this court to discuss the second issue of "substantial relatedness." [6]

B. Equal Protection Challenge

Plaintiffs [7] argue in the alternative that the ordinance, as it is applied by the City, violates the Equal Protection Clause of the Fourteenth Amendment.

At the outset, plaintiffs concede that the "rational basis" test is to be used in the analysis of their due process claim because the ordinance does not affect a fundamental right, *see Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), and does not discriminate against a suspect class.

The Equal Protection Clause directs that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). To withstand constitutional scrutiny under the rational basis test, the classifications created by the legislation "must be rationally related to a legitimate governmental purpose." *Id.* at 446.

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[6] We note that the Supreme Court has stated that "the privileges and immunities clause is not an absolute." *Toomer*, 334 U.S. at 396. Further, the Court has pointed out that the "States should have considerable leeway in analyzing local evils and in prescribing appropriate cures," *id.*, but the court must determine whether nonresidents are the source of the evils that do exist and whether the actions taken by the states are reasonably related to curing them, *id.*; *see Mullaney v. Anderson*, 342 U.S. 415, 418 (1952). As was the case in *Camden*, there was no trial, thus there were no findings of fact. If we had held public employment to be within the scope of the Clause, remand would have been necessary to permit the district court to make findings on this issue. *See Camden*, 465 U.S. at 223.

[7] Although Scull does not have standing to challenge the ordinance as violative of the Privileges and Immunities Clause, he does have standing to assert an equal protection challenge.

The Supreme Court has held that municipal residency requirements for maintaining employment are not irrational. *McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645, 647 (1976); *see also Detroit Police Officers Ass'n v. City of Detroit*, 405 U.S. 950 (1972) (dismissing appeal for failure to present a substantial federal question by challenging a Detroit residency requirement for police officers), *dismissing appeal from* 190 N.W.2d 97 (Mich. 1971) (en banc). The Supreme Court of New Jersey has also held that municipal residency requirements do not violate equal protection guarantees. *Kennedy v. City of Newark*, 148 A.2d 473 (N.J. 1959) (rejecting a state constitutional challenge); *Trainor v. City of Newark*, 368 A.2d 381 (N.J. Super. Ct. App. Div. 1976).

Despite the foregoing principles, plaintiffs have raised several equal protection challenges which we will address in turn.

1. State Law Exceptions

The City's residency ordinance states that all officers and employees of the City are to be residents but the New Jersey Legislature has enacted several statutes that exempt certain employees from municipal residency requirements.[8] These exemptions appear to leave the residency

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[8] In particular, N.J.S.A. 40A:14-9.1 exempts firefighters, N.J.S.A. 40A:14-122.1 exempts police officers, and N.J.S.A. 18A:26-1.1 exempts teachers from the residency requirements. Lastly, some officer posts and appointed positions may be held by nonresidents. N.J.S.A. 40A:9-1.1 (nonresident may be appointed director of public safety); N.J.S.A. 40A:9-11 (nonresident may be counsel, attorney, engineer, health officer, auditor or comptroller of the municipality). *See also*, Municipal Residency Ordinance #78-3 (exempting certain positions requiring specialized education and talent and those individuals "grandfathered" in under the ordinance) (JA 38-39).

The City contended in its brief, and at oral argument, that these exemptions should not be considered applicable to the City of Salem. As a "technical" matter, the City does not have any paid firefighters so the state exemption does not apply. Further, the

requirement applicable only to blue-collar and clerical employees of the City.

Although the governing state statutes exempt many employees from the ordinance, their validity is not before this court. Thus, we focus, as the district court did, solely on whether there is a "rational basis" for the City's residency requirement. The controlling issue is whether a legitimate governmental purpose is served by the classification of the ordinance, keeping in mind that we will only set aside the ordinance's classifications "if no grounds can be conceived to justify them." *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 809 (1969). An examination of the purposes set forth in the preamble to the ordinance under attack reveal grounds to support the ordinance, *e.g.*, "provide unto the City economic benefits". We conclude that it serves a legitimate governmental purpose.

2. Grandfather Clause Exception

Section 3(d) of the Municipal Residency Ordinance exempts from the residency requirement "[a]ny person employed by the City who resides outside the City as of the date of the adoption of this ordinance." JA 39. Appellants claim that this is an irrational application of the residency requirement.[9]

City does not employ any teachers or librarians in the context required for those exemptions to apply. Lastly, the City avers that although there is an exemption for the Public Safely Director, the City does not have such a position.

[9] Appellants offer as an example Mr. Kenneth Homan, Scull's former supervisor. Mr. Homan was "grandfathered" in because he began working for the City prior to the enactment of the City ordinance. Appellants suggest that Mr. Homan should have been living in the City as required by the state law at that time that required all "officers" reside within their respective municipalities. *See* N.J.S.A. 40A:9-1 (repealed June 30, 1978). It is interesting to note, however, that even if Mr. Homan was not "grandfathered" in under the new ordinance, he would have been exempt from the

The Supreme Court has approved of "grandfather" clauses that protect individuals and interests from changes in the law that would destroy established reliance on previously valid regulations and laws. *See City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (upholding in the face of an equal protection challenge a grandfather clause that exempted certain street vendors from new regulations in the French Quarter). Further, we note that at least two courts of appeals have upheld the validity of such clauses under a rational basis analysis. *Lorenz v. Logue*, 611 F.2d 421, 423 (2d Cir. 1979) (per curiam) ("By not applying [the residency requirement] to pre-1978 employees who never received any warning of a residency requirement when they took their jobs, the City protected these employees' legitimate expectations." (emphasis in original)); *Simien v. City of San Antonio*, 809 F.2d 255, 257 (5th Cir. 1987) ("The grandfathering of other employees based on the length of their employment is a constitutional means to gradually achieve a workforce that resides in the city."). We also conclude that the exemption of those employees who were employed prior to the adoption of the ordinance and who lived outside the City does not render the ordinance unconstitutional.[10] We find no irrationality in this grandfather clause.

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ordinance by virtue of N.J.S.A. 40A:9-11, which exempts "health officers." As Mr. Homan was Superintendent of the municipal water supply and waste water treatment facility and required to be licensed as a health officer pursuant to N.J.S.A. 26:1A-41, he would be exempt. *See generally* N.J.S.A. 26:1A-7 (granting the State Department of Health jurisdiction over matters relating to sewage and waste water).

[10] The ordinance's grandfather exemption is not absolute, however. Section 3(d) states that if the grandfathered employee "subsequently makes his residence within the City [he] shall not be exempt from the requirements of this ordinance."

C. Fourteenth Amendment Due Process Challenges

Plaintiffs raised five claims of due process violations under the Equal Protection Clause in the district court. The district court held that each was without merit and granted summary judgment to the City. Appellants' brief presents only two of the original five claims for our review.

1. Selective Enforcement

Plaintiffs claim that although the ordinance had been in effect for more than fourteen years at the time of Scull's notice of violation, there was an absence of evidence that it was invoked, which they argue shows that it was being selectively enforced against Scull. The City, however, provided evidence of enforcement of the ordinance against an employee who chose to reside outside of the City. JA 188-91. Because the City was able to negate the appellants' claim that the ordinance was never enforced, the district court properly granted summary judgment. The appellants have not met their burden, which requires them to offer evidence "that the [municipality] intentionally and purposefully discriminated against [Scull] by failing to prosecute other similarly situated persons." *United States v. Torquato,* 602 F.2d 564, 570 (3d Cir.), *cert. denied,* 444 U.S. 941 (1979). Thus the City was entitled to summary judgment.

2. Notice of the Requirement

Plaintiffs next contend that Scull had not been given written or oral notice of the residential requirement when he was appointed to his position. The record, however, contains evidence that copies of the ordinance were posted in work areas so as to give notice to employees. JA 186.[11] We note further that Scull was given ample time

[11] Despite our hesitation to point to such hearsay evidence, we recognize that the summary judgment record contains an unchallenged affidavit of Mr. Thomas G. Smith, Sr., Salem's Municipal

and opportunity to avoid termination once he had been given notice of his violation.[12] Our review of the record reveals that Scull has failed to raise an issue of material fact that would require a reversal of the district court's grant of summary judgment.

IV.

We will affirm the district court's order granting the defendants' summary judgment and denying plaintiffs' motion for summary judgment.

Administrator, that states that Scull contacted the president of the Association prior to moving out of the City to inquire into the requirements of the ordinance. JA 183. Mr. Smith's affidavit avers that the president disclosed that Scull contacted him and that the inquiry was revealed during grievance proceedings that took place prior to this suit. *Id.*

[12] Scull was given an initial period of ten days to correct his situation by his employer but this period was later extended to six months. Ultimately, the time requirement was stayed pending the outcome of these proceedings.

SLOVITER, *Chief Judge*, dissenting.

It is ironic that notwithstanding the intent of the Privileges and Immunities Clause to "fuse into one Nation a collection of independent, sovereign States," *Toomer v. Witsell,* 334 U.S. 385, 395 (1948), the motivation to retain privileges for one's own citizens has remained strong. Thus, the history of the Privileges and Immunities Clause, albeit somewhat sparse, consists of a series of cases in which obstacles erected by parochialism but sought to be justified in the name of valid local interests generally have been found wanting when measured against the goal of national unity.

The issue before us is apparently one of first impression for an appellate court: whether the Clause applies to statutes burdening purely public employment. Because I conclude, contrary to my colleagues, that it does apply, I respectfully dissent.

I.

The majority bases its holding that the Privileges and Immunities Clause is inapplicable in this case on its conclusion that "direct public employment is not a privilege or fundamental right protected by the Privileges and Immunities Clause of Article Four." Maj. Typescript Op. at 10. It recognizes that the Supreme Court cases have dealt only with private employment in this context. The majority infers, however, based on language it quotes from the Court's opinion in *United Building & Construction Trades Council v. Mayor & Council of Camden,* 465 U.S. 208 (1984) (hereinafter *Camden*), that the Supreme Court was establishing an unwavering distinction between private and public employment. However, *Camden,* rather than providing the basis for a restrictive ruling, is a case that significantly expanded the scope of the Privileges and Immunities Clause by applying it to restrictions placed on employment of nonresidents by private employers on publicly-funded work projects. Therefore, I believe that the majority's conclusion does not follow from *Camden.*

There can be no question that among the privileges encompassed in the Privileges and Immunities Clause is that of employment. The centrality of commerce among the protections provided by that Clause is well-established, notwithstanding the focus of the Court in an early discussion on other attributes of citizenship. In *Paul v. Virginia,* the Court stated the purpose of the Clause is:

> to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits the discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

75 U.S. (8 Wall.) 168, 180 (1869).

Thus, although equality of commercial opportunities among citizens of different states was primarily seen as the function of the Commerce Clause, there were early cases that relied on the Privileges and Immunities Clause to strike state statutes that discriminated against efforts of nonresidents to ply their trade. *See, e.g., Blake v. McClung,* 172 U.S. 239 (1898) (invalidating state law which granted preference to resident creditors of insolvent foreign corporations); *Ward v. Maryland,* 79 U.S. (12 Wall.) 418 (1871) (striking Maryland statute which established discriminatory licensing fee scheme based on residency for the sale of out-of-state goods).

Justice Brennan has dated the analytical framework used in the modern cases applying the Clause to *Toomer v. Witsell,* 334 U.S. 385 (1948), holding violative a South Carolina statute requiring nonresidents to pay a shrimp harvesting licensing fee one hundred times greater than that charged residents. *See also Mullaney v. Anderson,* 342 U.S. 415 (1952) (invalidating commercial fishing licensing fee which was ten times greater for nonresidents than for residents of Alaska).

Although the majority rationalizes its holding on the survival of a public/private distinction, in fact the Supreme Court has consistently rejected public ownership of assets as a sufficient justification in itself for discriminatory rules. In *Hicklin v. Orbeck,* 437 U.S. 518 (1978), Alaska sought to justify its preference for employing Alaska residents in projects developing Alaskan oil or gas on the ground that "the oil and gas that are the subject of Alaska Hire are *owned* by the State." *Id.* at 528. The Supreme Court rejected that contention, stating, "[w]e do not agree that the fact that a State owns a resource, of itself, completely removes a law concerning that resource from the prohibitions of the Clause." *Id.*

Even in the one recent Supreme Court case to uphold a state preference, *i.e.,* Montana's rule charging its residents a lower fee than charged to nonresidents for a license to hunt elk for sport, the Court noted that despite the early cases giving states the right to preserve their wildlife bounty for their citizens alone, "[i]n more recent years . . . the Court has recognized that the States' interest in regulating and controlling those things they claim to 'own,' . . . is by no means absolute." *Baldwin v. Fish & Game Comm'n of Montana,* 436 U.S. 371, 385 (1978). The Court cautioned that "a State's interest in its wildlife and other resources must yield when, without reason, it interferes with a nonresident's right to pursue a livelihood in a State other than his own, a right that is protected by the Privileges and Immunities Clause." *Id.* at 386. Thus, the rationale that the Court used in sustaining

Montana's licensing scheme was that elk hunting was not a "basic and essential activit[y], interference with which would frustrate the purposes of the formation of the Union," *id.* at 387, rather than one based on public ownership of the wilderness and its bounty.

It was in this stage of the analytic development of the Clause that the Court decided *Camden,* a decision noteworthy on several grounds. Before that decision, the Court had not applied the Privileges and Immunities Clause to municipal ordinances. In *Camden,* the Court ruled that because "a municipality is merely a political subdivision of the State from which its authority derives . . . what would be unconstitutional if done directly by the State can no more readily be accomplished by a city deriving its authority from the State." 465 U.S. at 215. Moreover, it rejected the New Jersey Supreme Court's conclusion "that the Privileges and Immunities Clause does not apply to an ordinance that discriminates solely on the basis of *municipal* residency." *Id.* The Court applied a common sense approach, recognizing that "[a] person who is not residing in a given State is *ipso facto* not residing in a city within that State." *Id.* at 216-17. Therefore, "an out-of-state citizen who ventures into New Jersey will not enjoy the same privileges as the New Jersey citizen residing in Camden." *Id.* at 217. Thus, the Camden ordinance was subject to constitutional review under the Clause at the behest of out-of-state residents.

The other landmark ruling to emerge from the *Camden* opinion was, of course, the holding that the City of Camden's hiring preference ordinance, requiring that at least forty percent of the employees of contractors and subcontractors working on city construction projects be Camden residents, was subject to the strictures of the Privileges and Immunities Clause. The ruling was particularly noteworthy because the preceding year the Court sustained an analogous executive order of the mayor of Boston against a challenge under the Commerce Clause. *See White v. Massachusetts Council of Constr. Employ-*

ers, Inc., 460 U.S. 204 (1983). The Court explained, however, that "the fact that Camden is merely setting conditions on its expenditures for goods and services in the marketplace [which defeated the Commerce Clause challenge in *White*] does not preclude the possibility that those conditions violate the Privileges and Immunities Clause." *Camden*, 465 U.S. at 220.

Accordingly, the Court turned to the "threshold matter" of "whether an out-of-state resident's interest in employment on public works contracts in another State is sufficiently 'fundamental' to the promotion of interstate harmony so as to 'fall within the purview of the Privileges and Immunities Clause.' " *Id.* at 218 (citation omitted). The majority and I differ in our interpretation of the Court's analysis in response to this query.

The Court first stated that "[c]ertainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause." *Id.* at 219. It continued, in the sentence the majority finds dispositive, "[p]ublic employment, however, is qualitatively different from employment in the private sector; it is a subspecies of the broader opportunity to pursue a common calling." *Id.* The Court then noted that it had held there is no fundamental right to government employment for purposes of the Equal Protection Clause, citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam), and referred to its decision in *White* holding that the Commerce Clause did not preclude such municipal favoritism of residents in employment.

Notwithstanding all of the above, the Court proceeded to hold that the Privileges and Immunities Clause was applicable. The Court distinguished the Commerce Clause analysis from that applicable to the Privileges and Immunities Clause, stating that "[i]t is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce." *Id.* at 220. I read the Court's opinion in *Camden* as holding that notwithstanding the inapplica-

bility of other clauses of the Constitution to a municipal residency requirement, such a requirement trenches on the *raison-d'etre* of the Privileges and Immunities Clause.

Consistent with its decision in *Hicklin,* the *Camden* Court rejected the argument that the public ownership of the assets used for the municipal projects immunized the residency requirement from Privileges and Immunities scrutiny, noting that in its earlier cases it had concluded "that the State's interest in controlling those things it claims to own is not absolute." *Id.* at 221. It continued,

> Much the same analysis, we think, is appropriate to a city's efforts to bias private employment decisions in favor of its residents on construction projects funded with public moneys. The fact that Camden is expending its own funds or funds it administers in accordance with the terms of a grant is certainly a factor—perhaps the crucial factor—to be considered in evaluating whether the statute's discrimination violates the Privileges and Immunities Clause. *But it does not remove the Camden ordinance completely from the purview of the Clause.*

Id. (emphasis added).

The *Camden* opinion suggests, even if it does not actually hold, that even a direct municipal residency requirement or preference for municipal employment will be subject to scrutiny under the Privileges and Immunities Clause. Although the Court did indeed comment that "[t]he opportunity to seek employment with [private contractors and subcontractors engaged in public works] is 'sufficiently basic to the livelihood of the Nation' . . . as to fall within the purview of the Privileges and Immunities Clause even though the contractors and subcontractors are themselves engaged in projects funded in whole or part by the city," *id.* at 221-22 (citation omitted), this does not signify that when faced with a direct employment issue, the Court would accept the distinction made by the majority.

The expansive reading the Court gave to the Clause suggests to the contrary, particularly in light of the undisputed fact that in recent times, as public employment continues to expand, nearly one-sixth of all jobs in New Jersey, as well as one-fifth of those throughout the country, are held by public employees. App. at 138-44 (citing data from Bureau of Labor Statistics, U.S. Dept. of Labor, *Employment, Hours, and Earnings, States and Areas, Data for 1987-1992* 384 (1992) (documenting that of a total of 3,493,100 nonfarm employees in New Jersey, 566,700 or 16.2% were government employees and that nationally, of a total of 89,930,000 nonfarm employees, 18,379,000 or 20.4% were government employees)). In terms of its economic importance, it can hardly be doubted that government employment surpasses shrimp fishing, *Toomer v. Witsell*, 334 U.S. 385 (1948), commercial fishing, *Mullaney v. Anderson*, 342 U.S. 415 (1952), trade of foreign goods, *Ward v. Maryland*, 79 U.S. (12 Wall) 418 (1871), and the practice of law, *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), all trades sufficiently fundamental to warrant the Clause's protection.

I do not suggest that a residence requirement for municipal employees necessarily violates the Privileges and Immunities Clause. This is, as the Court noted in *Camden*, only the first step. Once it is determined that the Privileges and Immunities Clause is applicable, the court must then apply the *Toomer* analysis, under which it must be determined whether there is a "substantial reason" for the difference in treatment and "whether the degree of discrimination bears a close relation" to those reasons. *See Toomer*, 334 U.S. at 396. The majority's analysis pretermits that inquiry. The result is that a substantial number of jobs will be permanently foreclosed from out-of-state residents for what may be insubstantial reasons. This is a result that I believe is incompatible with the Privileges and Immunities Clause.

II.

The appellants do not challenge the legal principle eunciated by the majority that municipal residency requirements for public employment do not on their face violate the Equal Protection Clause. Their objection is a different one, in that they pose a challenge to the ordinance as it has been applied. Essentially their claim is that the cumulative effect of the various exemptions from the residency requirement, both statutory and in practice, makes any distinction between residents and nonresidents arbitrary or irrational.

Thus, the appellants argue that "a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational" cannot be deemed rational. Appellants' Brief at 37 (citing *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985)). I do not understand the majority to challenge the contention that in the main it is the clerical and blue collar workers of the city who are required to be Salem residents, while employees who are better connected politically, such as police, supervisors, and other white collar workers, work for the city but reside outside of its borders. The majority explains that each of the exemptions has a justifiable explanation, such as an exemption pursuant to state statute or a legitimate grandfather clause. The majority's analysis, however, fails to take into consideration the cumulative effect of the exemptions. Even if each exemption is itself explicable, together they produce a patchwork of exemptions that throw into question the rationality of the scheme.

I am, above all, troubled by the allegation that the residency requirement lay dormant until applied against appellant Scull when he questioned the conduct of a volunteer firefighter at the scene of a fire. *See* App. at 173. I find the majority's response, that the residency requirement was also enforced against another employee, unpersuasive. Nonetheless, because I believe that this is

an appropriate case for decision of the still undecided question of the applicability of the Privileges and Immunities Clause to public employment, I rest on that ground alone for my position that the order of the district court should be reversed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

[Filed Sep. 13, 1993]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 92-1137

SALEM BLUE COLLAR WORKERS ASSOCIATION and STEPHEN SCULL,

Plaintiffs,

v.

THE CITY OF SALEM; MAYOR and COMMON COUNCIL OF SALEM; MAYOR LEON JOHNSON; CITY OF SALEM COMMON COUNCIL MEMBERS, JOHN BURKE; ROBERT DAVIS; ROBERT ELK; BETSY ERHARDT; EARL GAGE; ROBERT JOHNSON; DONALD SHARP; and JOSEPH WEAVER, individually and in their official capacities,

Defendants.

OPINION

GERRY, Chief Judge

This lawsuit challenges the City of Salem's municipal residency ordinance, which requires city employees to reside in the city. Plaintiffs claim that this ordinance violates the Privileges and Immunities Clause of Article IV of the United States Constitution in addition to various other provisions of the United States and New Jersey Constitutions. Plaintiffs are the Salem Blue Collar Workers Association, the collective bargaining agent for blue collar and clerical workers employed by the City of Salem, and Stephen Scull, a laborer for the City and member of the union who has been threatened with termination because he lives outside the city. They seek declaratory relief, preliminary and permanent injunctive relief, and damages against the City of Salem and various officials thereof.

The case is presently before the court on cross-motions for summary judgment.

I. *Facts*

The following facts are undisputed. The Salem residency ordinance was enacted in 1978 and provides that

> all full-time permanent and full-time, part-time officers and employees hereinafter to be employed by the City of Salem are hereby required as a condition of their employment to have their place of abode in the City of Salem and be a bona fide domiciliary therein.[1]

The ordinance has been interpreted by the City to apply only to those hired or appointed after its effective date, thus effectively "grandfathering" those who were previously employed by the City and live elsewhere. The ordinance authorizes the Mayor and Common Council "for good and sufficient cause" to waive the ordinance where residence outside of the city is required due to the health of the employee, due to the nature of the employment, or where "specialized talent or technique is required, such as professional services of engineers or accountants."

The ordinance further requires that as "a condition of employment, each and every employee or prospective employee shall be required to execute an affidavit, in [a] form prescribed by the Mayor and Common Council, setting forth . . . that [the] employee is domiciled in the City." It also provides that any employee who is not a resident is to be given "a ten (10) day notice setting

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[1] At the time the ordinance was enacted, all elected and appointed officers of municipalities in New Jersey were required to be residents of such municipalities by virtue of state law, N.J. Stat. Ann. 40A:9-1. A few months later, however, that statute was repealed and replaced by N.J. Stat. Ann. 40A:9-1.3, which provides that "the governing body of any local unit may by resolution or ordinance, as appropriate, require, subject to the provisions of this act, all officers and employees employed by the local unit after the effective date of this act to be bona fide residents therein."

forth the charge that the employee is not a bona-fide resident" and therefore faces discharge.

Since the ordinance's enactment in 1978, no one has been fired for failure to comply with it.[2] It has never been discussed or negotiated with the Union, and there is no reference to it in the parties' collective bargaining agreement. The Mayor and Common Council have never promulgated an affidavit regarding residency nor required any employee or prospective employee to execute such an affidavit, as provided for in the ordinance. The City's standard employment application asks for the prospective employee's address and includes a certification as to the accuracy of the information provided. The application does not indicate that all employees are required to be city residents, and the City provides nothing in writing to any new employee prior to hiring that indicates that municipal employment is conditioned on city residency.

The City's police officers, firefighters, and public school teachers[3] are exempted from the ordinance by operation of state law. *See* N.J. Stat. Ann. 40A:14-122.1 (precluding imposition of municipal residency ordinances on police officers); N.J. Stat. Ann. 40A:14-9.1 (firefighters); N.J. Stat. Ann. 18A:26-1.1 (teachers). Additionally, many skilled and supervisory personnel have been informally exempted from the ordinance; but none of these employees have sought or received official waivers from the Mayor and City Council.

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[2] Defendants have submitted an affidavit stating that in 1991 the Municipal Administrator confronted an employee who worked for the City as a clerk typist with an allegation that she no longer resided in the City, in violation of the ordinance. According to the affidavit, she chose to resign rather than face charges under the ordinance.

[3] Defendant contends that teachers are not municipal employees, but are instead employed by the Salem Board of Education, which is an autonomous agency.

Plaintiff Salem Blue Collar Workers Association is the collective bargaining agent for blue collar and clerical employees of the City of Salem. Some members of the Association live outside the State of New Jersey. Additionally, other members of the Association might be willing to reside outside the State of New Jersey but for the City's residency ordinance.

Plaintiff Stephen Scull was hired by the City as a laborer on November 20, 1989, at which time he was a resident of the city. He was not asked to sign an affidavit evidencing that he was a resident of the city, nor was he informed by any city official of the residency requirement. At some time thereafter, Mr. Scull moved out of Salem to another location in New Jersey because of concern for the health and safety of his children. On January 31, 1992, Kenneth Homan, Superintendent of the Salem Water and Sewerage Department, told Mr. Scull that because he was residing outside the city he was in violation of the municipal residency ordinance. He was informed that he had thirty days in which to correct the violation, at which time termination proceedings would begin.

On March 9, 1992, the Salem Blue Collar Workers Association filed an Unfair Practice Charge and an Order to Show Cause before the New Jersey Public Employment Relations Commission, contending that the City of Salem violated the New Jersey Employer-Employee Relations Act, N.J. Stat. Ann. 34:13A-5.4(a)(1) & (5). On March 17, 1992, plaintiffs filed this action pursuant to 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201. On April 9, 1992, the City agreed to be temporarily restrained from disciplining Stephen Scull or any other member of the Salem Blue Collar Workers Association for any violation of the residency ordinance until further order of the New Jersey Public Employment Relations Commission. Action on the Association's unfair practice charge before the Commission was postponed

indefinitely pending the outcome of plaintiffs' constitutional challenge in this court.

II. *Discussion*

Under Fed. R. Civ. P. 56, summary judgment is appropriate only if all the probative materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). *See, e.g., Hersh v. Allen Products Co.*, 789 F.2d 230, 232 (3d Cir. 1986); *Lang v. New York Life Ins. Co.*, 721 F.2d 118, 119 (3d Cir. 1983). Although the record before us contains numerous disputes as to issues of fact, none of these are material to the legal analysis of plaintiffs' claims. Thus, based on the undisputed facts presently before the court, we conclude as a matter of law that all of plaintiffs' claims must fail.

Plaintiffs primarily rest their challenge on the Privileges and Immunities Clause of Article IV of the United States Constitution, but they also make arguments under the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the equivalent clauses of the New Jersey Constitution. We address each claim in turn.

A. *Article IV Privileges and Immunities Clause*

The Privileges and Immunities Clause of Article IV states that "[t]he citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The Clause was intended to foster a national economic union by limiting a state's power to discriminate against residents of other states. *See, e.g., Supreme Court of N.H. v. Piper*, 470 U.S. 274, 280 (1985); *Toomer v. Witsell*, 334 U.S. 385, 395-96 (1948); *Paul v. Virginia*, (8 Wall) 168, 180 (1869). The Supreme Court has relied on the Privileges and Immunities Clause to invalidate a variety of state statutes that place unreasonable burdens on out-of-state citizens and whose sole

basis for classification is place of residency. *See, e.g., Piper,* 470 U.S. 274 (New Hampshire's residency requirement for admission to the bar); *Hicklin v. Orbeck,* 437 U.S. 518 (1978) (Alaskan statute requiring all contracts in connection with construction of Alaskan oil and gas pipelines to give preference in hiring to Alaskan residents); *Austin v. New Hampshire,* 420 U.S. 656 (1975) (commuter income tax imposed only on out-of-state residents who work in state); *Doe v. Bolton,* 410 U.S. 179 (1973) (state statute prohibiting abortions performed on out-of-state residents); *Mullaney v. Anderson,* 342 U.S. 415 (1952) (statute of Territory of Alaska charging non-residents forty-five dollars more for commercial fishing license than residents); *Toomer,* 334 U.S. 385 (South Carolina statute requiring non-residents to pay one hundred times more for commercial shrimp license than residents); *Ward v. Maryland,* 79 U.S. (12 Wall) 418 (1871) (Maryland statute requiring only non-resident merchants to obtain license to practice their trade, charging higher fees to non-resident than to resident merchants, and prohibiting merchants from using non-resident salesmen to sell goods in Baltimore).

Even though a municipal ordinance, such as Salem's, discriminates against in-state residents who live outside the city in addition to out-of-state residents, the Supreme Court has held that the Privileges and Immunities Clause is no less applicable to laws that discriminate on the basis of municipal residency than it is to laws that discriminate on the basis of state residency. *See United Bldg. & Constr. Trades Council v. Mayor & Council of Camden,* 465 U.S. 208, 215-218 (1984). In so holding, the Court noted that while "[in-state] residents at least have a chance to remedy at the polls any discrimination against them[,] [o]ut-of-state citizens have no similar opportunity." *Id.* at 217 (citations omitted). Accordingly, out-of-state residents burdened by a municipal residency ordinance must be accorded the protections of the Clause.

Thus, while the Court held that municipal residency ordinances are subject to challenge under the Clause, it also made clear that such a challenge may only be brought by out-of-state residents. "[T]he disadvantaged [in-state] residents have no claim." *Id.* at 217. The complaint alleges that plaintiff, Stephen Scull, lives outside Salem but inside the State of New Jersey. Accordingly, as an in-state resident, he has no claim against the Salem ordinance under the Privileges and Immunities Clause. Summary judgment on his claim will therefore be granted in favor of defendants.

The Salem Blue Collar Workers Association asserts that it has members who live outside the state as well as members who might live outside the state but for the ordinance. Since this factual assertion remains unchallenged by defendants, the union does have standing to assert a Privileges and Immunities Clause claim. *See id.* at 212, n.4 (Privileges and Immunities Clause challenge to municipal ordinance cognizable where plaintiff union "has at least some members who reside outside New Jersey"). Accordingly, we proceed to consider whether the union's rights under the Clause are violated by the Salem ordinance.

The first step in determining whether a statute or ordinance violates the Privileges and Immunities Clause is to inquire "whether the ordinance burdens one of those Privileges and Immunities protected by the Clause." *United Bldg. & Constr. Trades Council,* 465 U.S. at 218. Not all discrimination against out-of-state residents is prohibited. It is only with respect to those 'privileges' and 'immunities' that are "sufficiently basic to the livelihood of the Nation" and that "bear[] on the vitality of the Nation as a single entity," *Baldwin v. Fish & Game Comm'n,* 436 U.S. 371, 383, 388 (1978), that "a State must accord residents and nonresidents equal treatment." *Piper,* 470 U.S. at 279. States are, for example, free to restrict voting rights to those who are citizens, and free to require those who

run for public office to be citizens. *See Baldwin*, 436 U.S. at 383. Additionally, the Supreme Court has held that it is permissible for a state to charge more to a non-resident than to a resident for a recreational elk-hunting license, because elk-hunting is not a "means of a livelihood" and thus not fundamental to a national economic union. *See id.* at 388.

On the other hand, statutes that burden the ability of non-residents "to ply their trade, practice their occupation, or pursue a common calling within the State," *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978), repeatedly have been held to come within the purview of the Clause. It is plaintiffs' contention that the Salem ordinance falls within this category. Defendants argue, however, that ordinances that burden public employment are fundamentally distinguishable from ordinances that burden private employment, and that only the latter come within the purview of the Clause.

No court has directly addressed this question of whether the Clause applies to statutes burdening purely public employment. Those cases that have found employment to be protected by the Clause have generally involved government regulation of private employment. *See, e.g., Supreme Court of Va. v. Friedman*, 487 U.S. 59 (1988) (practice of law); *Piper*, 470 U.S. 274 (same); *Mullaney v. Anderson*, 342 U.S. 415 (1952) (commercial fishing); *Toomer*, 334 U.S. 385 (commercial shrimp harvesting); *Ward v. Maryland*, 79 U.S. (12 Wall) 418 (1871) (merchants); *O'Reilly v. Board of Appeals*, 942 F.2d 281 (4th Cir. 1991) (driving taxi cabs); *Silver v. Garcia*, 760 F.2d 33 (1st Cir. 1985) (insurance consulting); *Tangier Sound Watermen's Assoc. v. Douglas*, 541 F. Supp. 1287 (E.D.Va. 1982) (commercial fishing). Additionally, the language used to describe the nature of the privileges and immunities protected by the Clause often uses words such as "commerce," "commercial," "trade," and "business," which seem to suggest private

commercial activity as opposed to public or government employment. For example, the fourth article of the Articles of Confederation, from which the Privileges and Immunities Clause was derived "with no change of substance or intent," *Austin v. New Hampshire,* 420 U.S. 656, 660-61 (1975), specifically referred to "the privileges of trade and commerce." Additionally, the Supreme Court has characterized the activities covered by the Clause as "lawful commerce, trade or business," *Ward v. Maryland,* 79 U.S. (12 Wall) 418 (1871), and "doing business," *Toomer v. Witsell,* 334 U.S. 385, 396 (1948).

None of this is dispositive, of course. We cite these cases not as conclusive precedent, but simply to illustrate an apparent underlying assumption in the cases interpreting the Privileges and Immunities Clause that the types of "trades," "occupations," and "common callings" with which the Clause is concerned are those that are directly involved with the private realm of business and commerce rather than the public realm of government. This supposition has been borne out by the Supreme Court's treatment of the public/private distinction in two more recent cases analyzing claims under the Clause, *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985), and *United Bldg. & Constr. Trades Council v. Mayor and Council of Camden,* 465 U.S. 208 (1984). While not directly on point, the Court's reasoning in these two cases rests on the precept that purely public employment is outside the reach of the Clause.

In *Piper* the Court considered the applicability of the Clause to the practice of law in the context of a challenge to a rule restricting admission to the bar to state residents. The language of that opinion indicates that it was the private nature of the employment involved that rendered it subject to Privileges and Immunities Clause scrutiny. The Court concluded that the practice of law was a "privilege" within the meaning of the Clause because it is "important to the national economy" and because "the 'activi-

ties of lawyers play an important part in *commercial intercourse.*'" *Id.* at 281 (emphasis added) (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975).

The Court rejected an argument that the Clause should be inapplicable to lawyers because they are "officer[s] of the court" who "exercise[] state power on a daily basis," not because it took issue with the proposition that jobs involving the "exercise of state power" should be exempt from scrutiny under the Clause, but rather because it viewed lawyers more as private businessmen than public servants. *Id.* at 283. "We conclude that a lawyer is not an 'officer' [of the court] within the ordinary meaning of that word. He 'makes his own decisions, follows his own best judgment, collects his own fees and runs his own business.'" *Id.*, (quoting *In re Griffiths*, 413 U.S. 717, 728-29 (1973)). Thus, the Court's reasoning in *Piper* rested on an assumption that purely public employment was not a "privilege" or "immunity" protected by the Clause.

In *United Bldg. & Constr. Trades Council v. Mayor and Council of Camden*, 465 U.S. 208 (1984) ("the Camden Case"), the Supreme Court considered whether employment by private contractors working on public works projects came within the purview of the Clause. In order to understand the Court's reasoning in this case, one must first be familiar with another Supreme Court case decided just one year previously, *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983). *White* involved a Commerce Clause challenge to an executive order of the Mayor of Boston requiring fifty percent of all jobs on construction projects funded by that city to be filled by city residents. In deciding whether the Commerce Clause was implicated by such a regulation, the Court found it important to determine whether the employment affected was private or public. The Commerce Clause imposes restraints on economic regulation of private parties by individual states. Thus, where a state acts

as a "market regulator" (i.e. telling private employers who they can hire), the Commerce Clause is implicated. Where a state acts instead as a "market participant" (i.e., in hiring its own employees), the Commerce Clause is not implicated. *See id.* at 207. The Court held that the employees affected by the Boston executive order, even though working for private contractors, were essentially public employees since they were paid by city funds. Therefore, since Boston was acting as a market participant rather than a market regulator, it was not subject to the restrictions of the Commerce Clause. *Id.* at 215.

In the Camden case, the Supreme Court considered a very similar ordinance in the City of Camden, New Jersey, which required forty percent of the employees of private contractors and subcontractors working on city construction projects to be Camden residents. This time, however, the challenge was based on the Article IV Privileges and Immunities Clause rather than the Commerce Clause. The defendants, invoking *White*, argued that those affected were essentially public employees and that the preference for residents was therefore constitutionally acceptable. The Court rejected this argument, "declin[ing] to transfer mechanically into [the context of the Privileges and Immunities Clause the analysis from *White*, which was] fashioned to fit the Commerce Clause," *id.* at 219, and ultimately concluded that the type of employment burdened by the Camden ordinance was "one of those Privileges and Immunities protected by the Clause," *id.* at 218, 221.

That holding is not controlling here since the case before us involves direct government employment rather than employment by government contractors. In holding that the quasi-public employment at issue in the Camden case was protected by the Clause, the Supreme Court did not conclusively answer the question we face: whether purely public employment is embraced by the Clause. An examination of the reasoning employed by the Court to reach its holding, however, should shed some light on that

question. Did the Court conclude that the employment burdened by the Camden ordinance came within the Clause because all employment, whether private or public, comes within the Clause—or because it was distinguishable from purely public employment?

Plaintiffs and defendants interpret the Court's reasoning differently on this score, and both parties have been able to find language in the opinion to support their opposing arguments. Plaintiffs argue that the Supreme Court's refusal to apply the *White* analysis in the Camden Case means that the public/private distinction has no relevance to Privileges and Immunities Clause analysis, and that burdens on all types of employment, whether private or public, implicate the Clause. Defendants argue that the Court's rejection of *White* was not a wholesale rejection of the public/private distinction itself, but merely a refusal to adopt the specific criteria set forth in *White* for determining whether a particular employment is more properly characterized as public or private. According to their interpretation, the Court found the Clause to apply to the Camden ordinance because it found employment by government contractors to be more properly characterized as private than public in this context. For the reasons set forth below, we find defendants' reading of the opinion more persuasive.

The Court began its analysis in the Camden case with two observations, which are critical to an understanding of its subsequent reasoning. First it stated that "[p]ublic employment . . . is qualitatively different from employment in the private sector." *Id.* at 219. It then went on to state, "[i]t can certainly be argued that for purposes of the Privileges and Immunities Clause everyone affected by the Camden ordinance is also 'working for the city' and, *therefore, has no grounds for complaint when the city favors its own residents.*" *Id.* (emphasis added). These initial observations set up two percepts on which the subsequent analysis rests. The first is that the distinction between public and private employment is significant.

The second is that someone who is in fact "working for the city" (a public employee) has no grounds for complaint under the Privileges and Immunities Clause; in other words, purely public employment is outside the purview of the Clause.

It is the passage immediately following this second observation on which plaintiffs rely most heavily for their argument that the Supreme Court viewed the private/public employment distinction as irrelevant to the Privileges and Immunities Clause analysis.

> But we decline to transfer mechanically into this context an analysis fashioned to fit the Commerce Clause. Our decision in *White* turned on a distinction between the city acting as a market participant and the city acting as a market regulator. The question whether employees of contractors and subcontractors on public works projects were or were not, in some sense, working for the city was crucial to that analysis. The question had to be answered in order to chart the boundaries of the distinction. But the distinction between market participant and market regulator relied upon in *White* to dispose of the Commerce Clause challenge is not dispositive in this context. The two Clauses have different aims and set different standards for state conduct.

Id. at 219-20. The Court went on to explain that the market participant/regulator distinction is important in the Commerce Clause context because the purpose of that Clause is to avoid conflict between federal and state regulation. The Privileges and Immunities Clause, on the other hand, while also aimed at prohibiting barriers to commerce between the individual states, is rooted more in the individual's right to travel from state to state to pursue her livelihood. *Id.* at 220. Thus, while the Commerce Clause focuses on the actions of the state or municipality (as either market regulator or market participant), the Privileges and Immunities Clause focuses on

the right of the individual employee to pursue her livelihood.

Plaintiffs read this passage as rejecting entirely any consideration of the distinction between public and private employment in the context of the Privileges and Immunities Clause. A better reading of this passage, however, interprets it not as rejecting the private/public employment distinction entirely, but rather as rejecting the particular approach the Court took in *White* to decide whether employment by private contractors using public funds constituted public or private employment. Nowhere in this passage did the Court use the words "public" or "private." Rather, it discussed the "distinction between the city acting as a market participant and the city acting as a market regulator." *Id.* at 219. This was the test the Court devised in *White* to draw the line between pubiic and private employment. In refusing to apply the *White* test to the Camden case, the Court was simply saying that the line between public and private would not necessarily be drawn in the same place when the Privileges and Immunities Clause was at issue as when the Commerce Clause was at issue.

Later in the opinion, the Court stated:

> The fact that Camden is expending its own funds . . . in accordance with the terms of a grant is certainly a factor—perhaps the crucial factor—to be considered in evaluating whether the statute's discrimination violates the Privileges and Immunities Clause. But it does not remove the Camden ordinance completely from the purview of the Clause . . . .

Id. at 221. "The fact that Camden is expending its own funds" under the *White* analysis is what would have made it a market participant and what therefore would have pushed the employment at issue over the line into the public sphere. In the Camden case, while it was a factor to be considered, "the fact that Camden [was] expending its own funds" was not enough in itself to

render the employment public and thus did not completely remove it from the purview of the Clause.

Finally, the language used by the Court in concluding its analysis indicates that it was ultimately the private nature of the employment at issue in the Camden case that brought it within the purview of the Privileges and Immunities Clause. According to the Court, "[t]he opportunity to seek employment with such *private employers* is 'sufficiently basic to the livelihood of the Nation' as to fall within the purview of the Privileges and Immunities Clause *even though the contractors and subcontractors are themselves engaged in projects funded in whole or part by the city.*" *Id.* at 221-22 (emphasis added) (quoting *Baldwin v. Mont. Fish & Game Comm'n*, 436 U.S. 371, 388 (1978). Thus, the same type of employment that the Court considered public for purposes of the Commerce Clause was considered private for purposes of the Privileges and Immunities Clause.[4] The Court's original precept that those who are in fact "working for the city" have no cause to complain remained true, but the test for determining whether someone is working for the city had changed.

Thus, while isolated passages of the Court's opinion in the Camden case may appear to support plaintiffs' position when read out of context, a careful reading of the case as a whole demonstrates that the Court did not view the public/private distinction as irrelevant to the Privileges and Immunities Clause analysis. Rather, the Court's reasoning rested on a presumption that purely public employment would be beyond the reach of the Clause.

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[4] This is consistent with the Court's view that the Commerce Clause focuses on the perspective of the state or local government while the Privileges and Immunities Clause focuses on the perspective of the individual. *See supra* at 16. Thus, from the perspective of the Cities of Boston or Camden, the employment involved in these two cases would appear public, since the cities were disbursing public funds. From the perspective of the employee hired by a private contractor, however, the employment would appear private.

Such a precept is consistent with the Clause's purposes of preventing barriers to free trade and commerce between the states and creating a single economic union. There are significant differences between a state imposing restrictions on its own workers—as any employer has certain latitude to do—and a state forcing private employers to impose restrictions on their employees. The latter involves government restraint on the liberty of the private employers affected, and additionally has a much broader and more comprehensive impact on free trade and commerce between the states. Thus, the type of state regulation of private employment that is typically struck down under the Clause imposes a blanket burden on all persons attempting to pursue a certain livelihood. The Salem ordinance, in contrast, only affects those people seeking employment with one small employer in the state: the City of Salem. When Maryland charges more for a commercial fishing license to out-of-state residents than to state residents, anyone from out of state wishing to pursue fishing as a livelihood in Maryland is burdened. When, on the other hand, the City of Salem chooses to impose a residency requirement on clerical employees, all out-of-state residents wishing to pursue a livelihood as a secretary in New Jersey are not burdened. Indeed, the vast majority of secretarial jobs in the state remain open to out-of-state residents. Thus, commerce as a whole is not significantly affected.

Whether municipal employment comes within the purview of the Privileges and Immunities Clause presents an issue of first impression. Because Supreme Court dicta indicates that public employment is not subject to the protections of the Clause, and because we find that application of the Clause in a situation such as this—where the jobs affected represent a negligible percentage of the state's total job market—would be antithetical to the purposes and policies that animate it, we hold that the employment burdened by the Salem residency ordinance is not a "privilege" or "immunity" within the meaning

of the Clause. Summary judgment is therefore granted in favor of defendants on this claim.

B. Equal Protection Challenge

Plaintiffs also challenge the ordinance under the Equal Protection Clause of the Fourteenth Amendment. Since the ordinance does not affect a fundamental right [5] or discriminate against a protected group for purposes of equal protection analysis, plaintiffs acknowledge that the ordinance must be measured against the least strict of the equal protection standards: the rational basis test. *See, e.g., City of Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 439-41 (1985); *Schweiker v. Wilson,* 450 U.S. 221, 230 (1981); *Dandridge v. Williams,* 397 U.S. 471, 483-87 (1970). "[L]egislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne,* 473 U.S. at 440. Thus, the burden rests on those challenging the classification to show that it is not rationally related to its purpose. *See New Orleans v. Dukes,* 427 U.S. 297, 303 (1976) (per curiam).

"The State may not rely upon a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne,* 473 U.S. at 446. On the other hand, "[i]f [a] classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Dandridge v. Williams,* 397 U.S. 471, 485 (1970) (quoting *Lindsley v. Natural Cargonic Gas Co.,* 220 U.S. 61, 78 (1911)). "[T]here is no constitutional requirement that regulations must cover every class to which they might be applied." *Wardwell v. Board of Educ.,* 529 F.2d 625, 629 (6th Cir. 1976).

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[5] *See United Bldg. & Constr. Trades Council,* 465 U.S. at 219 (no fundamental right to government employment).

The Supreme Court has held that municipal residency ordinances similar to Salem's are not irrational *per se*. *See McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645, 646 (1976); *Detroit Police Officers Ass'n v. City of Detroit*, 405 U.S. 950 (1972) (dismissing for lack of federal question appeal of decision by Supreme Court of Michigan rejecting equal protection challenge to municipal residency ordinance); *see also Wardwell*, 529 F.2d at 628; *Ahern v. Murphy*, 457 F.2d 363 (7th Cir. 1972); *Ector v. City of Torrance*, 514 P.2d 433 (Cal. 1973), *cert. denied*, 415 U.S. 935 (1974); *Kennedy v. City of Newark*, 148 A.2d 473 (N.J. 1959). Plaintiffs, however, do not argue that the classification between residents and non-residents inherent in any residency ordinance is irrational. Rather, they make a more particularized claim that the Salem ordinance is irrational to the extent that it contains so many exceptions and loopholes: police officers, fire fighters, and teachers are exempted; as well as many supervisory officials.[6] They argue that there is no rational reason why clerical and blue collar workers should be required to be Salem residents, while virtually every other employee is exempted. Moreover, they argue that the exemption of employees hired before 1978, under the grandfather provision of the ordinance, is not rationally related to any legitimate purpose.

The exemptions of police officers, firefighters, and teachers are not written into the Salem ordinance itself, but rather are mandated by state law. *See* N.J. Stat. Ann. 40A:14-122.1 (precluding imposition of municipal residency ordinances on police officers); N.J. Stat. Ann. 40A:14-9.1 (firefighters); N.J. Stat. Ann. 18A:26-1.1

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[6] These supervisory officials include the superintendent of the Water and Sewerage Department, the city building officer, the city engineer, the municipal attorney, a judge of the Salem Municipal Court, and the city's chief financial officer. There is a dispute between the parties as to whether or not the city administrator resides in the city.

(teachers). Since these classifications are created by state statutes, rather than the municipal ordinance, it is not clear that they are properly challenged in this lawsuit which is against the municipality only. *See Trainor v. City of Newark*, 368 A.2d 381, 386 (N.J. Super. Ct. App. Div. 1976). Moreover, the legislative history behind these statutes indicates that they were passed because municipal residency requirements made the recruitment of new employees more difficult. *See id.* at 475. This is a legitimate purpose to which the exemption of police and fire fighters is rationally connected.

The exemptions of supervisory officials are not mandated by state law, although some such exemptions are explicitly permitted by state statute.[7] The exemption of these positions also meets the rational basis test, however, since such positions require people with special education and skills who may not be available among the pool of Salem residents.

Finally, the distinction created by the grandfather clause between employees hired before and after 1978 serves a rational purpose by protecting the legitimate expectations of those hired before the residency ordinance's enactment, who had no warning of it prior to accepting municipal employment. We therefore find that it withstands minimum scrutiny as well. We are not alone in so holding. *See Lorenz v. Logue*, 611 F.2d 421, 423 (2d Cir. 1979); *Wardwell v. Bd. of Educ.*, 529 F.2d 625, 629 (6th Cir. 1976).

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[7] *See* N.J. Stat. Ann. 40A:9-1.1 (a "municipality may . . . appoint to office of director of public safety a nonresident of said municipality"); N.J. Stat. Ann. 40A:9-1.2 (same for municipal treasurer); N.J. Stat. Ann. 40A:9-11 ("A nonresident of any municipality may hold office as counsel, attorney, engineer, health officer, auditor, or comptroller of such municipality"); N.J. Stat. Ann. 2A:8-7 ("A magistrate who is an attorney at law need not be a resident of the municipality or municipalities to which the jurisdiction of the court extends").

C. Due Process Challenges

Plaintiffs assert five claims which they characterize as Fourteenth Amendment Due Process challenges to the ordinance. On the basis of the undisputed facts presently before us we find each of these claims is without merit as a matter of law.

Plaintiffs' first claim alleges "selective enforcement" of the Salem residency ordinance. They assert that since the ordinance's enactment in 1978, Salem has not attempted to enforce it except against plaintiff, Stephen Scull.[8] Defendant contests the factual accuracy of this assertion; but even assuming plaintiffs' version of the facts to be correct, we find no constitutional violation.

It is well-established that " 'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.' " *Bordenkircher v. Hayes*, 434 U.S. 357, 668-69 (1978) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). To state such a claim, there must be evidence of intentional and purposeful discrimination on the part of the government. *United States v. Torquato*, 602 F.2d 564, 570 (3d Cir.), *cert. denied*, 444 U.S. 941 (1979).[9] Otherwise, the mere fact that certain persons have been permitted to violate the ordinance or statute without prosecution does not

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[8] We note that although plaintiffs characterize their claim as a due process violation, claims of selective prosecution are usually analyzed under equal protection standards.

[9] Although *Bordenkircher*, *Oyler*, and *Torquato* involved selective prosecution of a criminal statute, we find application of the same standard dispositive in this case. If there is any difference between the standards for selective enforcement of civil and criminal statutes, it must be that the government is held to a higher degree of scrutiny in the criminal context since the deprivation at stake is so much more severe. Accordingly, to the extent we find that the City has not violated the more stringent criminal standard, we can be sure that it has not violated the civil standard.

preclude the government from enforcing it against others. *Abrahams v. Civil Serv. Comm'n*, 319 A.2d 483, 490 (N.J. 1974). Here plaintiffs have not adduced any evidence, nor do they allege that the City's failure to enforce the ordinance except against Stephen Scull was purposeful and intentional and "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Bordenkircher*, 434 U.S. at 669. Therefore, we find no constitutional violation.

Plaintiffs' second argument is that the City committed a due process violation by its failure to provide Stephen Scull with written or oral notice of the residency requirement at the time he was hired. First, we note that this is not a standard procedural due process claim challenging the government's removal of an entitlement without providing notice and an opportunity to be heard. Plaintiffs do not dispute that Stephen Scull was provided advance notice and an opportunity to be heard regarding the City's intent to terminate him for violation of the ordinance. Rather, they argue that due process standards required the City to give Mr. Scull notice of the ordinance before he was hired. Plaintiffs have offered no legal authority in support of this argument. In the absence of any authority to the contrary, we must adhere to the age-old maxim that ignorance of the law is no excuse. That rule "is 'deeply rooted in the American legal system,' and exceptions to it must not be casually created." [10] *United*

[10] The Supreme Court has only "recognized certain very limited circumstances in which a State's reliance on the maxim that a man may be presumed to know the law is not consistent with the restrictions imposed by the Constitution on legislative action." *Texaco v. Short*, 454 U.S. 516, 545 (1982) (Brennan, J. dissenting). Thus, in *Lambert v. California*, 355 U.S. 225 (1957), the Court held that a municipal ordinance which made it an offense for any convicted felon to remain in the city for more than five days without registering with the police violated due process standards when applied to someone who neither knew nor could reasonably be expected to know of her legal obligation. Critical to the Court's holding in that case, however, was the fact that the defendant had

States v. Rogers, 962 F.2d 342, 344 (4th Cir. 1992) (quoting *Cheek v. United States*, 111 S.Ct. 604, 609 (1991)); *accord, United States v. International Minerals and Chem. Corp.*, 402 U.S. 558 (1971). Thus, to the extent that notice of the residency requirement prior to hiring was constitutionally required, we hold that the existence of the statute itself was sufficient to provide such notice.

Third, plaintiffs argue that the ordinance is void for vagueness. A law will be struck down on vagueness grounds where it "lacks explicit standards for its application, and this impermissibly delegates basic policy matters to [government officials] for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Plaintiffs argue that this ordinance is void for vagueness because "the Mayor and Council have complete discretion in authorizing exemptions from Salem's resident preference, [and] the City has failed to adopt standards for the granting of such exemptions." [11] In fact, however, the Mayor and Council do not have "complete discretion" because the statute itself sets forth explicit standards for the granting of exemptions. The ordinance states:

> EXCEPTIONS. The Mayor and Common Council are hereby authorized in their discretion for good and sufficient cause being shown, to permit any officer or employee of the City of Salem to remain in the employ of the City without complying with the provisions hereof where:

---

been given no opportunity to comply with the law and avoid its penalty upon first being made aware of its existence. *Id.* at 229. In this case, Stephen Scull has been given the option of moving back into Salem to comply with the municipal residency ordinance. *See* Affidavit of Thomas G. Smith, ¶ 14; Affidavit of Stephen Scull, ¶ 6.

[11] Plaintiffs' brief at 58.

> [a] The health of any officer or employee necessitates residence outside the City limits;
>
> [b] The nature of employment is such as to require residence outside the City;
>
> [c] Specialized talent or technique is required such as professional services of engineer [sic] or accountants

Indeed, the New Jersey Supreme Court has held that a municipal residency ordinance worded nearly identically to this one would not be impermissibly vague. In *Abrahams v. Civil Serv. Comm'n*, 319 A.2d 483 (N.J. 1974), the exceptions provision of a Newark residency ordinance was challenged on vagueness grounds under the United States Constitution. That ordinance contained categories for exemptions nearly identical to [a] and [b] above, in addition to a third category permitting an exemption where "[s]pecial circumstances attach." *Id.* at 484. The court held the last category void for vagueness, but found the first two categories sufficiently specific to adequately guide the discretion of the responsible officials. *Id.* at 489-90. Moreover, the court noted that had the third category specified the meaning that city officials attributed to the words "special circumstances," it would also have been sufficient to withstand the vagueness challenge. The "meaning" the court referred to was strikingly similar to section [c] of the Salem ordinance: "special talent or technique which is necessary for the operation of government not found among Newark residents." *Id.* We agree with the New Jersey Supreme Court that this language provides sufficient limits on official discretion to survive a vagueness challenge.

Fourth, plaintiffs make a cursory attempt to invoke the substantive due process right to *intra*-state travel recently recognized by the Third Circuit in *Lutz v. City of York*, 899 F.2d 255, 270 (3d Cir. 1990). We fail to see how the holding in *Lutz* offers any support to plaintiff's claim, however. There the court held that the right "to move freely about one's neighborhood or town . . . is indeed

'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history,' " and thus subject to substantive due process protection. *Id.* at 268 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) and *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)). The court further held that a municipal ordinance outlawing "cruising" (consisting of "driving repeatedly around a loop of certain major public roads through the heart of the city," *id.* at 256) burdened this right and was therefore subject to intermediate scrutiny. We see no reason to presume that the limited right recognized by the Third Circuit in that case, to move freely about one's neighborhood, would encompass the right that plaintiffs claim here: to commute from outside Salem to a job with the Salem government. Accordingly, we find this claim to be without merit as well.

Fifth and finally, plaintiffs argue that the City of Salem acted *ultra vires* in enacting the ordinance and that it is therefore void. According to this argument, the City of Salem is a creature of the state legislature and therefore has no powers beyond those provided by the state. Because state law provides that an employee who violates a municipal residency ordinance shall be given six months to resume residency before termination procedures begin, *see* N.J.S.A. 40A:9-1.5, plaintiffs argue that Salem's ordinance, which provides only ten days' notice, is *ultra vires*. *See City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923). Plaintiffs characterize this as a federal due process violation but do not cite any authority for that characterization.

Defendant argues that Salem's ordinance pre-dates N.J. Stat. Ann. 40A:9-1.5, and therefore is not bound by it. Indeed, the statute states at N.J. Stat. Ann. 40A:9-1.9,

> The provisions of this act shall apply to all residency requirements adopted on and after the effective date of this act. Nothing herein shall be construed as to alter, abrogate, repeal or otherwise affect any resi-

> dency requirement in effect in any local unit by ordinance . . . on the effective date of this act [June 30, 1978].

Plaintiffs argue in response that since the enabling legislation under which Salem's ordinance was originally enacted has now been repealed, the City must comply with the current statutory provision, but they offer no authority for this proposition. In the absence of any such authority we are understandably disinclined to disregard the apparently clear import of the statuory language cited above. Accordingly, we find this claim without merit as well.

Finally, plaintiffs assert that to the extent the ordinance violates the federal constitution it also violates the state constitution. Since we find no federal constitutional violation, and plaintiffs have given us no reason to believe that the New Jersey Constitution's reach is broader than that of the federal constitution with respect to these claims, summary judgment is also granted to defendants with respect to plaintiffs' claims under the New Jersey Constitution.

III. *Conclusion*

For the reasons set forth above, we find that there are no disputed issues of material fact and that as a matter of law Salem's residency ordinance does not violate the Privileges and Immunities Clause of Article IV, the Equal Protection or Due Process Clauses of the Fourteenth Amendment to the United States Constitution, or any provisions of the New Jersey Constitution. We therefore grant summary judgment in favor of defendants as to all counts.

/s/ John F. Gerry
JOHN F. GERRY
Chief Judge

DATED: September 13, 1993

[Filed Sep. 13, 1993]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 92-1137

SALEM BLUE COLLAR WORKERS ASSOCIATION and STEPHEN SCULL,

Plaintiffs,

v.

THE CITY OF SALEM; MAYOR and COMMON COUNCIL OF SALEM; MAYOR LEON JOHNSON; CITY OF SALEM COMMON COUNCIL MEMBERS, JOHN BURKE; ROBERT DAVIS; ROBERT ELK; BETSY ERHARDT; EARL GAGE; ROBERT JOHNSON; DONALD SHARP; and JOSEPH WEAVER, individually and in their official capacities,

Defendants.

ORDER

This matter having come before the court on motion by plaintiffs for summary judgment and cross-motion by defendants for summary judgment, and the court having considered the submissions of the parties, and for good cause shown;

It is, this 13th day of September, 1993, hereby ORDERED that plaintiffs' motion is DENIED and defendants' motion is GRANTED. Summary judgment is therefore entered in favor of defendants on all counts.

/s/ John F. Gerry
JOHN F. GERRY
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5622

SALEM BLUE COLLAR WORKERS ASSOCIATION; and STEPHEN SCULL,

Appellants,

v.

THE CITY OF SALEM; LEON JOHNSON, Mayor of the City of Salem; JOHN BURKE, Common Council Member of the City of Salem; ROBERT DAVIS, Common Council Member of the City of Salem; ROBERT ELK, Common Council Member of the City of Salem; BETSY ERHARDT, Common Council Member of the City of Salem; EARL GAGE, Common Council Member of the City of Salem; ROBERT JOHNSON, Common Council Member of the City of Salem; DONALD SHARP, Common Council Member of the City of Salem; JOSEPH WEAVER, Common Council Member of the City of Salem, individually and in their official capacities,

Appellees.

Appeal from the United States District Court
for the District of New Jersey

(D.C. Civil Action No. 92-cv-01137)

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and SEITZ,* *Circuit Judges*

The petition for rehearing filed by appellants in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Mansmann would grant rehearing.

By the Court,

/s/ William D. Hutchinson
Circuit Judge

Dated: Sep. 28, 1994

*** Hon. Collins J. Seitz, United States Circuit Judge, was limited to voting for panel rehearing.**

AN ORDINANCE REQUIRING CITY OF SALEM EMPLOYEES TO BE RESIDENTS OF THE CITY OF SALEM, IN THE STATE OF NEW JERSEY, AS A CONDITION OF EMPLOYMENT

WHEREAS, the rate of unemployment in the City of Salem is among the highest in the State of New Jersey; and

WHEREAS, by reason thereof it is in the best interests of the residents of the Ctiy of Salem, that its officers and employees be residents of said City; and

WHEREAS, it is acknowledged that such a residency requirement as a condition of employment is proper and advantageous to the City of Salem; and

WHEREAS, said residency will not only reduce the high unemployment rate in the City, but will also improve relations among City employees; enhance the quality of employee performance by greater personal knowledge of conditions and problems in the City; promote a feeling of greater personal interest in the City's progress; reduce the possibility of tardiness and absenteeism; provide a ready availability of trained manpower for emergency situations; and provide unto the City economic benefits;

NOW THEREFORE, BE IT ORDERED by the Mayor and Common Council of the City of Salem, in the County of Salem, State of New Jersey, as follows:

SECTION 1: RESIDENT DEFINED. For the purpose of this ordinance a resident is a person permanently domiciled within the City of Salem; a domicile which has not been adopted with the intention of taking up or claiming a previously residence within the City.

SECTION 2: RESIDENCE REQUIRED. Except as otherwise provided by law, all full-time permanent and full-time, part-time officers and employees hereinafter to be employed by the City of Salem, are hereby required as

a condition of their employment to have their place of abode in the City of Salem and be a bonafide domicilary therein.

SECTION 3: EXCEPTIONS. The Mayor and Common Council are hereby authorized in their discretion for good and sufficient cause being shown, to permit any officer or employee of the City of Salem to remain in the employ of the City without complying with the provisions hereof where:

[a] The health of any officer or employee necessitates residence outside the City limits;

[b] The nature of employment is such as to require residence outside the City;

[c] Specialized talent or technique is required such as professional services of engineer or accountants;

[d] Any person employed by the City who resides outside the City as of the date of the adoption of this ordinance; such person who subsequently makes his residence within the City shall not be exempt from the requirements of this ordinance.

SECTION 4: COMPLIANCE.

[a] Failure of any officer or employee, except as provided by law, to comply with this regulation shall be deemed, regardless of tenure or Civil Service status, sufficient cause for removal or discharge from the service of the City;

[b] The Mayor and Common Council of the City of Salem or its duly authorized agent is hereby authorized to investigate into the residency of any officer, employee, or appointee of the City and to require said officer, employee, or appointee to produce proof of bona-fide residence within the City of Salem;

[c] As a condition of employment, each and every employee or prospective employee shall be required to

execute an affidavit, in form prescribed by the Mayor and Common Council, setting forth, inter alia, that said employee is domiciled in the City of Salem;

[d] Any municipal officer, employee, or appointee shall be given a ten [10] day notice setting forth the charge that the employee is not a bona-fide resident of the City of Salem and shall be discharged on account thereof. Said notice shall provide that the employee shall be entitled to a full hearing on account of said employee's residency and said notice shall set forth the time and place when said hearing shall be held.

SECTION 5: SEVERABILITY. In the event any section of this Ordinance shall be declared to be illegal or unconstitutional by a Court of competent jurisdiction, such declarations shall not in any manner prejudice the enforcement of the remaining provisions.

This ordinance shall take effect according to law.

/s/ Kenneth R. Lewis
KENNETH R. LEWIS
Mayor

NOTICE

Notice is hereby given that the foregoing ordinance was introduced at a regular meeting of the Mayor and Common Council of the City of Salem, held on Monday, March 6, 1978, and at a regular meeting to be held on Monday, March 20, 1978, at 7:30 p.m., said Mayor and Common Council will hold a public hearing at the Freeholders Room of the Salem County Court House, 94 Market Street, Salem, New Jersey, to consider said ordinance for final passage.

/s/ Lee M. Munyon
LEE M. MUNYON
Recorder

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5622

SALEM BLUE COLLAR WORKERS ASSOCIATION
and STEPHEN SCULL,
Appellants,

v.

CITY OF SALEM; LEON JOHNSON, Mayor of the City of Salem; JOHN BURKE, Common Council Member of the City of Salem; ROBERT DAVIS, Common Council Member of the City of Salem; ROBERT ELK, Common Council Member of the City of Salem; BETSY ERHARDT, Common Council Member of the City of Salem; EARL GAGE, Common Council Member of the City of Salem; ROBERT JOHNSON, Common Council Member of the City of Salem; DONALD SHARP, Common Council Member of the City of Salem; JOSEPH WEAVER, Common Council Member of the City of Salem, individually and in their official capacities,
Appellees.

Appeal from the United States District Court
for the District of New Jersey

D.C. Civil No. 92-1137

Present: Sloviter, *Chief Judge,* Hutchinson and Seitz, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on May 2, 1994.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered September 15, 1993, be, and the same is hereby affirmed. Costs taxed against appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk
Clerk

Dated: August 25, 1994

Supreme Court, U.S.
FILED
JAN 20 1995
OFFICE OF THE CLERK

(2)

No. 94-1107

In The

Supreme Court of the United States

October Term, 1994

SALEM BLUE COLLAR WORKERS ASSOCIATION AND STEPHEN SCULL,

Petitioners,

v.

THE CITY OF SALEM AND MAYOR AND COMMON COUNCIL OF THE CITY OF SALEM, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

DAVID J. PUMA, ESQ.
Counsel of Record
WATERS, SHERMAN & PUMA, P.A.
107 West Broadway
Salem, New Jersey 08079
(609) 935-2244
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the decision of both the District Court and the Court of Appeals that a municipality enacted, fairly applied, continuous post-employment municipal residency requirement, applicable only to direct employees of the municipality, engaged in providing traditionally recognized local governmental services, does not burden a right so fundamental to the national union as to involve a "privilege" or "immunity" protected by Article IV, Section II of the United States Constitution, presents an issue on which this Court should grant a writ of certiorari.

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No. 94-1107

In The

Supreme Court of the United States

October Term, 1994

SALEM BLUE COLLAR WORKERS ASSOCIATION AND STEPHEN SCULL,

Petitioners,

v.

THE CITY OF SALEM AND MAYOR AND COMMON COUNCIL OF THE CITY OF SALEM, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

The Petitioners in this matter are the Salem Blue Collar Workers Association (the "Union") which is a labor organization representing clerical and blue collar workers employed by the City of Salem, and Stephen Scull ("Scull") a member of the Union.

The Respondents are the City of Salem[1] and the Mayor and Council Members of its governing body in their personal capacities.

In 1978 the City of Salem adopted Ordinance 78-3 which requires that all employees "hereinafter to be employed" are required to be residents of the City (54a - reference is to Petitioners' Appendix, page 54). There is no allegation by Petitioners of any technical impropriety with respect to the passage of the Ordinance. Furthermore, it is clear that by 1978 it was well settled in New Jersey that municipalities could adopt residency ordinances pursuant to the police power and that state statutes on the subject and the civil service laws did not operate to pre-empt the adoption of such ordinances. *Kennedy v. Newark*, 2 N.J. 178, 184-189, 148 A.2d 473 (1959).

At the time of the adoption of the Salem Residency Ordinance in 1978, most elected and appointed officers of municipalities in New Jersey were required to be residents by virtue of N.J.S.A. 40A:9-1, which was enacted by the New Jersey Legislature in 1971[2]. After the adoption of

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[1] The City of Salem is a small town located in Salem County New Jersey which has a population of approximately 6,883. See 1992 Official Directory of Salem County citing the 1990 U. S. Census.

[2] The 1971 statute did not apply to employees, only "elected and appointed officers". The statute also contained exceptions. It read as follows: "Except in the case of county administrator, counsel, attorney, engineer, health officer, auditor, comptroller, appointed tax collector, elected assessors who have received tenure under P.L. 1967, c. 44. s. 7 (C. 54:1-35.31), appointed tax assessor, or members of boards of assessors or as

the Salem Ordinance, N.J.S.A. 40A:9-1 was repealed by the New Jersey Legislature and replaced with N.J.S.A. 40A:9-1.3 through N.J.S.A. 40A:9-1.10. The new statutory scheme made residency of officers and employees discretionary with the municipality and established certain mandatory provisions to be inserted into municipal residency ordinances adopted after the effective date of the statutes. The new statutory scheme perpetuated all of the original exceptions to the 1971 statute (see N.J.S.A. 40A:9-11) and other exceptions were added by later statutes.

Petitioner Scull was hired as a laborer by the City on November 20, 1989 (29a). The position of "laborer" does not require passage of any civil service merit examination and thus Petitioner Scull did not have to apply for employment through the New Jersey Department of Personnel.[3] Petitioner Scull did however fill out a standard form employment application used by the City in which he stated that he resided in the City of Salem at the time and basically had been a resident all his life, even attending Salem High School.

On January 31, 1992, a letter was written by Kenneth L. Homan, Scull's immediate supervisor, indicating that a

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otherwise provided by law, every person holding an office, the authority and duties of which relate to a county only, or to a municipality only, shall reside within said county or municipality, as the case may be."

[3] This is significant because applicants for employment positions with the City receive notice of its residency requirements from the New Jersey Department of Personnel pursuant to N.J.A.C. 4A:4-2.11(c).

residency ordinance violation was alleged and that Scull should respond within thirty days or termination procedures would begin (29a). Scull immediately filed a grievance with respect to the violation. When the grievance was denied, but before civil service termination procedures were instituted, the Petitioners filed this suit and also filed an unfair practice charge with the New Jersey Public Employment Relations Commission. The City voluntarily joined in a consent order pursuant to which it was temporarily restrained from disciplining Scull for violating the Residency Ordinance until the challenges were resolved (29a).

Although both parties moved before the District Court to dispose of all issues presented in the case by summary judgment, it was acknowledged by both parties that there were some facts in dispute, but that the facts upon which the parties differed were not material, the District Court agreed (30a). The first area of dispute is whether Mr. Scull had actual knowledge of the residency requirement before he moved out of Salem. In his Affidavit filed with the summary judgment motion, Scull implies that he never knew of Salem's residency requirement (JA 173). Mr. Smith, the former City Administrator says in his Affidavit that the Union President revealed during the proceedings on the grievance filed by Scull, that he was approached by Scull who inquired as to the City's residency requirement before he moved out of Salem (JA 183-14).

The City contends that if not actual knowledge, Scull at least had constructive knowledge of the continuing residency requirement. The various Affidavits submitted before the District Court clearly show that the Residency

Ordinance was "common knowledge" amongst the Union members and other employees. A copy of the Ordinance has been posted on the bulletin board in the Salem Municipal Building for years (JA 186-24). Moreover, Mr. Homan, the Supervisor who hired Scull, says that it is his practice to notify all employees at the time of hire of the Residency Ordinance and that he would not have hired Scull if he had not been a Salem resident and did not understand that he must stay a Salem resident (JA 178-2).

The second area of dispute is Petitioners' allegation that the City has taken no steps to enforce its Ordinance since its adoption in 1978, has allowed numerous employees to violate the Ordinance with impunity, and now seeks to enforce its Ordinance only to punish Scull. I believe that this area of contention between the parties is more of a difference on how one chooses to characterize the facts, versus an actual factual dispute.

Consider these facts. The City registered its Ordinance with the New Jersey Department of Personnel as required by N.J.S.A. 40A:9-1.3. Since Salem has adopted the provisions of the New Jersey "Civil Service" code (i.e. N.J.S.A. 11A:1-1 *et seq.*) the Department of Personnel administers merit examinations and compiles the lists of eligible candidates from which the City hires employees. In 1984 the City fired a secretary on the basis of its Residency Ordinance. When the secretary challenged the Ordinance, the City defended and was successful (See Supplemental Certification and Newspaper Article from 1984 attached thereto, JA 188). The City was obviously conscious of its residency requirement in the appointment of its first ever municipal or City Administrator in 1988. Although it could have exempted the Administrator

pursuant to N.J.S.A. 40A:9-136 it chose not to and made that clear to the appointee (JA 182 ¶ 9 & 10)[4]. Prior to the violation by Mr. Scull there is clear evidence that the City had confronted an employee with her alleged violation of the Ordinance. That employee chose to resign, however, if she had not the City would have taken the appropriate steps to terminate her due to the Ordinance violation (JA 182 ¶ 11). When Scull's supervisor brought the violation of the Residency Ordinance to the attention of City Council, the City instructed him to notify Mr. Scull in writing to comply or face termination proceedings (JA 179 ¶ 3).[5]

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[4] Petitioners allege that "the City Administrator overseeing the ordinance" being enforced against Mr. Scull is a Salem Resident (Pb 5, footnote 4). This allegation surfaced for the first time in an Affidavit by the President of Petitioner Union made on January 7, 1993, and filed with the summary judgment motion before the District Court (JA 165 ¶ 15) in order to bolster the Union's claim that the City selectively enforced the Ordinance. Prior to that time neither the Union nor any other person had ever raised this allegation or complained in any way to the Mayor and Council. Upon receiving the January 7, 1993 Affidavit the City Attorney immediately advised both the Mayor and Council, and the City Administrator of the charges in writing. The City Administrator adamantly denied the allegations and made an Affidavit on February 5, 1993 to the contrary (JA 180). Shortly thereafter the City decided to eliminate the position of City Administrator for budgetary reasons, which action effectively terminated the individual holding that position.

[5] The District Court chose to completely ignore all of these facts, stating simply: "Since the ordinance's enactment in 1978, no one has been fired for failure to comply with it" (28a). This was due no doubt to the District Court's intention to accept all Petitioners' allegations as true in granting the City's cross motion for summary judgment.

The City sought no special retribution against Mr. Scull, indeed it offered to allow him six (6) months to comply with the Ordinance. If he had done so the incident would have been forgotten (JA 183 ¶ 14). When Scull refused, and in connection with the Union instituted suit to invalidate the Ordinance, the City resolved to defend its Residency Ordinance against the attack at great expense. Yet it still held open its offer to Mr. Scull if the suit was dismissed by an acceptable voluntary settlement. Moreover the City voluntarily agreed not to fire or otherwise discipline Scull until the challenges to the validity of the Ordinance were resolved (JA 44).

Petitioners' allegation that the City has allowed numerous employees to violate the Ordinance is also a mis-characterization. All officers or employees of the City of Salem who are not residents are within one of the following three classifications: (1) those who were non-resident employees prior to adoption of the Ordinance and thus are "grandfathered"; (2) those who are exempt from the Ordinance by the application of pre-emptive state statutes; or (3) those who, notwithstanding Petitioners' assertions, are not City employees but are employees of autonomous agencies.

The first class is clear enough. It includes those who were employed and were not residents at the time of the adoption of the Ordinance in 1978. This includes for example, Mr. Homan, Petitioner Scull's supervisor.[6]

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[6] Mr. Homan is certainly "grandfathered" because the date of his appointment (1957) precedes the Ordinance and he was a non-resident at the time of adoption and he has continued to be a non-resident (Homan Aff. ¶2). However, it is noted that Mr.

The second class is divided into two subcategories. The first is specific positions exempt by pre-emptive state statutes. These include counsel, attorney, engineer[7], health officer, auditor and comptroller (N.J.S.A. 40A:9-11); police[8] (N.J.S.A. 40A:14-122.1); treasurer (N.J.S.A. 40A:9-1.2); and municipal court judge (N.J.S.A.

Homan would be exempted from the Ordinance as a "health officer" by virtue of N.J.S.A. 40A:9-11. As the Superintendent of a municipal water supply and waste water treatment facility, Mr. Homan must maintain a license issued to him by the New Jersey Department of Health. See N.J.S.A. 26:1A-1 *et seq.* and specifically N.J.A.C. 8:6-1.1.

[7] It is arguable that Salem need not avail itself of the statute in relation to its municipal attorney and engineer. In both instances the City's contract is with a professional service corporation the office of which is located in Salem. It is however admitted that the members of these firms who primarily provide legal and engineering services to the City are not Salem residents.

[8] Although Salem Police Officers, like all other municipal police in New Jersey are exempt from municipal residency requirements pursuant to N.J.S.A. 40A:14-122.1 they are subject to a mandatory continuing requirement of residency within the State of New Jersey by N.J.S.A. 40A:14-122.8; certain age minimums and maximums by N.J.S.A. 40A:14-127; as well as a plethora of other statutory requirements. See generally N.J.S.A. 40A:14-122. It should also be noted that the state statute exempting police officers from municipal residency does not extend to "special police officers" or the "chief of police". Salem has applied its residency requirement to the so called special police officers and to its Chief of Police. It should also be noted that recently Bill A-2053 entitled "Authorizing municipal ordinances requiring residency for new police and firefighters" was sponsored in the New Jersey Assembly. The New Jersey League of Municipalities has issued a statement officially endorsing the Bill. See NJLM Legislative Bulletin, September, 1993.

2A:8-7).[9] The second subcategory involves situations where although the position is not specifically exempt, the interaction between two separate pre-emptive state statutes produces the same result. For example, the City recently appointed a non-resident Construction Code Official. Pursuant to N.J.S.A. 52:27D-126(a) Salem *must* employ a Construction Code Official. Since Salem is a "civil service" jurisdiction and the position of Construction Code Official is a "classified" position, Salem *must* select a candidate from a list of persons eligible for that position as promulgated by the New Jersey Department of Personnel in accordance with N.J.S.A. 11A:1-1 *et seq.* The Department of Personnel will allow Salem to fill the position with a non-resident only if no other residents qualify. In the case of the Construction Code Official that is what occurred. The position became open. The Department of Personnel advertised the positions availability and educational pre-requisites, administered an examination and promulgated a list of eligible candidates from which Salem could fill the position. No Salem residents qualified. The City then appointed the number one candidate on the list. A similar situation arose with respect to

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[9] There are other statutory exemptions such as N.J.S.A. 40A:14-9.1 which prohibits municipal residency requirements for paid firefighters. This statute is cited by Petitioners (Pb 4, footnote 3) however Salem has no paid firefighters. All Salem firefighters are volunteers who are all residents of the town.

the City's Chief Financial Officer[10] (see N.J.S.A. 40A:9-140.10).

The third and final class involves employees whom the Petitioners seek to attribute to the City of Salem but actually are employees of autonomous agencies. These include the teachers and superintendent of schools employed by the Salem Board of Education (a regional institution) and the librarians of the Salem Free Public Library System. Petitioners correctly indicate that N.J.S.A. 18A:26-1.1 prohibits requiring teachers to be residents (Pb 4, footnotes 3 and 4), however that proscription applies to boards of education, not municipalities. The City of Salem employs no teachers, school superintendents or librarians.

Thus although Salem's Ordinance appears to allow the Mayor and Council "to permit any officer or employee of the City of Salem to remain in the employ of the City without complying" with the Ordinance for certain specified reasons, it is submitted that the City has never exercised this reserved power. The few non-resident employees it has are exempt because they fit into one of the three classifications set forth above. No employee has been "informally exempted from the ordinance" as suggested by Petitioners (Pb 4).

Finally, Petitioners' allegation that "most . . . [of Salem's] municipal supervisory personnel" (Pb 4) and

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[10] Petitioners refer to "Salem's Financial Officer" (Pb 4, footnote 3). However, the actual position is "Chief Financial Officer". It is a part time position pursuant to a professional service contract.

policy-makers are exempt from the Residency Ordinance is incorrect. Realistically in a small town such as Salem the positions which one would consider to be "supervisory" or "policymaking" are limited. They would include of course the Mayor and members of the Common Council. In Salem these positions are in fact held by City residents. The City Administrator is a "policymaking" position. Pursuant to N.J.S.A. 40A:9-136, the City could have exempted its Administrator from the residency requirement. Salem decided to apply its residency requirement to its Administrator before it eliminated that position. One might classify the positions of City Clerk, Police Chief, Street Department Superintendent, Tax Assessor, Housing Officer, and Zoning Officer as "supervisory" or "policymaking" positions. These positions carry with them various discretions, responsibilities and independence pursuant to law. In the case of Salem all are residents subject to the City's continuing residency requirement.

REASONS FOR DENYING THE WRIT – SUMMARY OF ARGUMENT

This case concerns the applicability of the Privileges and Immunities Clause of Article IV, Section II of the United States Constitution to a municipal ordinance, applicable only to direct employees of the municipality, engaged in providing traditional local governmental services, which require such employees to maintain residency in the municipality during their employment. Petitioners assert that this Court's decision in *United Building & Construction Trades Council of Camden and*

Vicinity v. Mayor and Council of City of Camden, 465 U.S. 208 (1984) mandates application of the Privileges and Immunities Clause to such local residency requirements. It is however clear that the decision does not support Petitioners' assertion, but in fact supports the opposite conclusion as reached by Chief Judge Gerry of the United States District Court for the District of New Jersey and the Third Circuit Court of Appeals. The distinction is clearly evident in the fact that the enactment in question in the *Camden* case burdened private employment while the enactment in this case relates only to direct public employees of the municipality.

The conclusion of both lower courts is consistent with the Clause's purposes of preventing barriers to free trade and commerce between the states and creating a single economic union. As noted by the District Court:

> There are significant differences between a state imposing restrictions on its own workers – as any employer has certain latitude to do – and a state forcing private employers to impose restrictions on their employees. The latter involves governmental restraint on the liberty of the private employers affected, and additionally has a much broader and more comprehensive impact on free trade and commerce between the states. Thus, the type of state regulation of private employment that is typically struck down under the Clause imposes a blanket burden on all persons attempting to pursue a certain livelihood. The Salem ordinance, in contrast, only affects those people seeking employment with one small employer in the state: the City of Salem. When Maryland charges more for a commercial fishing license to out-of-state residents

> than to state residents, anyone from out-of-state wishing to pursue fishing as a livelihood in Maryland is burdened. When, on the other hand, the City of Salem chooses to impose a residency requirement on clerical employees, all out-of-state residents wishing to pursue a livelihood as a secretary in New Jersey are not burdened. Indeed, the vast majority of secretarial jobs in the state remain open to out-of-state residents. Thus, commerce as a whole is not significantly affected . . . we find that application of the Clause in a situation such as this – where the jobs affected represent a negligible percentage of the state's total job market – would be antithetical to the purposes and policies that animate it . . . (41a).

Petitioners have failed to demonstrate that the writ of certiorari should be granted, given the standards set forth in this Court's rule 10.1. The decision of the Court of Appeals in this matter is not in conflict with the decision of another court of appeals of the United States, or any other court, on the same matter. Moreover, contrary to Petitioners' assertions, the decision of the Court of Appeals in this case is not in conflict with this Court's decision in the *Camden* case; it is supported by it.

I SALEM'S MUNICIPAL RESIDENCY ORDINANCE DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE UNITED STATES CONSTITUTION

Petitioners' argue that Salem's Residency Ordinance violates the Privileges and Immunities Clause of Article IV, Section II of the United States Constitution (Pb 8).

That Clause provides that "The citizens of each State shall be entitled to all Privileges and Immunities in the several States".

Although municipal residency ordinances have consistently been upheld as against a seemingly endless number of alleged constitutional infirmities there appears to be no specific reference in any of the cases that such ordinances do not offend the Privileges and Immunities Clause. Thus Petitioners endeavor to create a novel argument, without any specific precedent and without any regard to the numerous precedents upholding the constitutionality of such ordinances, that would if accepted invalidate not only Salem's residency ordinance, but all such municipal residency requirements nationwide.[11]

Application of the Privileges and Immunities Clause to a governmental distinction based on residency entails a two-step inquiry. "As an initial matter the Court must decide whether the ordinance burdens one of those privileges and immunities protected by the Clause." *United Building & Construction Trades v. Camden*, 465 U.S. 208, 218, 79 L. Ed. 2d 249, 104 S. Ct. 1020 (1984). Not all forms of discrimination against citizens of other States are constitutionally suspect. *Id.* at 218. Thus this Court has stated:

> It has not been suggested, however, that state citizenship or residency may never be used by a

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[11] The form of government under which Salem is organized leaves the issue of municipal residency to the discretion of the governing body. In some New Jersey municipalities, state statutes now require municipal residency. For example see N.J.S.A. 40A:60-6(b) relating to "boroughs"; and there are others.

> State to distinguish among persons. Some distinctions between residents and non-residents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those "privileges" and "immunities" bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and non-resident, equally. *Baldwin v. Montana Fish & Game Comm.*, 436 U.S. 371, 383, 56 L. Ed. 2d 354, 98 S. Ct. 1852 (1978).

Thus as a threshold matter, this Court must determine whether an out-of-state resident's[12] interest in

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[12] Only non-New Jersey residents would have standing to challenge Salem's ordinance under the Privileges and Immunities Clause. New Jersey residents residing outside of Salem have no standing under the Clause; the theory being that they have a chance to remedy the intrastate distinction through the political process while out-of-state residents have no similar opportunity. See *United Building & Constr. Trades v. Camden*, 465 U.S. 208, at 217 citing *Slaughter-House Cases*, 16 Wall 36, 77, 21 L. Ed. 394 (1873). Petitioners allege that the Union has members who "reside outside the State of New Jersey" (See paragraph 3 of Plaintiffs' Complaint JA 9). However, no evidence of this was put before the District Court, other than Petitioners' allegation. The District Court mistakenly resolved the issue of standing in favor of Petitioners, believing that the allegation of out-of-state members contained in the Complaint "remains unchallenged by defendants" (32a). The said allegation in the Complaint was not the subject of an admission in the Answer thereto. See paragraph 3 of the Answer (JA 30). The Third Circuit upheld the District Court's decision in this regard citing to an affidavit of the Union President filed with their summary judgment motion (5a, footnote 1).

employment opportunities with local governments in the process of providing traditional local governmental services "is sufficiently fundamental to the promotion of interstate harmony so as to fall within the purview of the Privileges and Immunities Clause." *United Building & Constr. Trades v. Camden*, 465 U.S. 208, 218, 79 L. Ed. 2d 249, 104 S. Ct. 1020 (1984) citing *Baldwin* at 436 U.S. 388 and *Canadian Northern R. Co. v. Eggen*, 252 U.S. 553, 560, 64 L. Ed. 713, 40 S. Ct. 402 (1920); and *Blake v. McClung*, 172 U.S. 239, 248, 43 L. Ed. 432, 19 S. Ct. 165 (1898).

This is where Petitioners' novel theory fails. There is no fundamental right to be a municipal government employee which is protected by the Privileges and Immunities Clause.[13] That such a right is not fundamental to

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[13] In Section I of the argument in their Brief, Petitioners spend considerable effort to establish that the Privileges and Immunities Clause of the Constitution is entirely based on the Fourth article of the Articles of Confederation (Pb 10). The District Court and Court of Appeals agreed with this proposition but correctly noted that the said provision in the Articles of Confederation referred to "the privileges of trade and commerce" (34a and 9a). This observation by both lower courts is important, in terms of consistency, with the observation by both courts that the cases that have found employment to be protected by the Clause have generally involved government regulation of private employment. Petitioners simply ignore the clear import of these correct observations and, without any support, state: "The fact that eighteenth century America was characterized by concerns over trade and commerce and public employment was virtually non-existent, by no means evidences that the Privileges and Immunities Clause was intended to protect only certain occupations and not others" (Pb 12). Petitioners further attempt to respond to the observations of the lower courts in this regard by stating that the Articles of Confederation did not "refer to the practice of law, medicine, driving a taxi

interstate harmony is clearly evidenced by the long existence and judicial tolerance of municipal government residency requirements. The rights protected by the Clause are "confined" to those most basic and have been described as follows:

> The inquiry is, what are the privileges and immunities of the citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong to the citizens of all free governments; and which have at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.
>
> What these fundamental principals are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. *Baldwin v. Montana Fish & Game Comm.*, 436 U.S. 371, 385, 56 L. Ed. 2d 354, 98 S. Ct. 1852 (1978).

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cab, or operating as an insurance consultant but the exclusion of nonresidents from these positions or services is equally violative of the Clause" (Pb 12, footnote 3). The obvious infirmity with Petitioners retort is that all of the cited advocations represent endeavors of private trade or commerce and not traditional public employment roles.

In light of the foregoing, one can clearly distinguish a municipal residency preference in filling positions necessary to provide traditional local governmental services from the 1948 South Carolina statute that required non-residents to pay a fee of $2500.00 to shrimp commercially while residents of that state only had to pay $25.00 in *Toomer v. Witsell*, 334 U.S. 385, 92 L. Ed. 1460, 68 S. Ct. 1156 (1948); or the Alaska statute which required that all contracts in connection with the construction of the Alaskan oil and gas pipelines contain a provision requiring the employment of qualified Alaskan residents in preference to non-residents in *Hicklin v. Orbeck*, 437 U. S. 518, 57 L. Ed. 2d 397, 98 S. Ct. 2482 (1978); or the proscriptions against allowing lawyers, insurance agents and other professionals to practice in a state unless such professional was a *bona fide* resident of the state; see *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 84 L. Ed. 2d 205, 105 S. Ct. 1272 (1985).

These decisions and the many others cited by Petitioners center around the creation and protection of "a national economic union" (*Piper* at 470 U.S. 280) based upon a fundamental "privilege" of citizens of one State to do business in another State on terms substantially equal with that State's citizens. There is nothing in *Toomer*, *Hicklin*, or *Piper* which suggests that employment by municipalities engaged in providing traditionally recognized local government services is a protected privilege which is fundamental to interstate harmony, economic or otherwise.

Moreover, the decision in *United Building & Constr. Trades v. Camden*, 465 U.S. 208, 79 L. Ed. 249, 104 S. Ct. 1020 (1984) upon which Petitioners principally rely to

support their novel theory is clearly distinguishable. That case involved a City of Camden Ordinance which required that at least 40% of the employees of private contractors and subcontractors working on City construction projects be Camden residents. The Supreme Court of New Jersey held that the Privileges and Immunities Clause could not be applied to a municipal ordinance as opposed to an enactment of the state, and that the Clause would not apply to a distinction based solely on municipal residency because it was not aimed primarily at out-of-state residents. 88 N.J. 317, 443 A.2d 148 (1982). This Court reviewed and reversed that decision, holding that the Clause does apply to municipal as well as state enactments and that enactments which draw distinctions solely on municipal residency are not immune from the Clause.

Thus the Court went on to analyze whether the Camden ordinance burdened one of those privileges and immunities protected by the Clause. It phrased the issue as follows:

> As a threshold matter, then, we must determine whether an out-of-state resident's interest in employment on public works contracts in another State is sufficiently "fundamental" to the promotion of interstate harmony so as to "fall within the purview of the Privileges and Immunities Clause." *Id.* at 218-219.

In deciding that a fundamental right critical to interstate harmony was involved the Court stated:

> The opportunity to seek employment with such *private* employees is sufficiently basic to the

> livelihood of the Nation. *Id.* at 221. (Emphasis added).
>
> Certainly the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause. *Id.* at 219.

Thus it is clear that the Court in *United Building & Constr. Trades v. Camden,* was focussing on what it referred to as Camden's "efforts to bias *private* employment decisions in favor of its residents on construction projects funded with public moneys." *Id.* at 221. (Emphasis added.) The Camden ordinance dealt with private employers and employees providing services which are not thought of as traditional governmentally provided services (i.e. construction). This is clearly distinguishable from Salem's Ordinance which deals with direct employees of a public employer seeking to provide services traditionally provided by local governments.

Indeed, this Court in *United Building & Constr. Trades v. Camden,* specifically declined to consider the Camden ordinance as involving *public* employees in its Privileges and Immunities analysis. This Court had done so in *White v. Massachusetts Council of Construction Employers, Inc.,* 460 U.S. 204, 75 L. Ed. 2d 1, 103 S. Ct. 1042 (1983) which involved a virtually identical enactment as that in the Camden case, however the analysis in *White* was solely under the Commerce Clause and did not involve the Privileges and Immunities Clause.[14] Under the "market participant vs. market regulator" analysis called for by

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[14] Note that this Court in *White* ultimately upheld the public construction residency requirement as against the Commerce Clause challenge.

the Commerce Clause in *White* this Court held that everyone employed on a city public works project is, "in a substantial if informal sense, working for the city". *Id.* at 460 U.S. 211, 75 L. Ed. 2d 1, 103 S. Ct. at 1042. In *United Building & Constr. Trades v. Camden*, the Court specifically declined to treat the employees affected by Camden's ordinance as *public* employees stating:

> *It can certainly be argued that for purposes of the Privileges and Immunities Clause everyone affected by the Camden ordinance is also "working for the city" and, therefore, has no grounds for complaint when the city favors its own residents. But we decline to transfer mechanically into this context an analysis fashioned to fit the Commerce Clause.* Our decision in *White* turned on a distinction between the city acting as a market participant and the city acting as a market regulator. The question whether employees of contractors and subcontractors on public works projects were or were not, in some sense, working for the city was crucial to that analysis. The question had to be answered in order to chart the boundaries of the distinction. But the distinction between market participant and market regulator relied upon in *White* to dispose of the Commerce Clause challenge is not dispositive in this context. *Id.* at 219-220. (Emphasis added.)

Unlike the facts in *United Building & Constr. Trades v. Camden*, in the case at bar there is no question that all employees affected by the Salem Ordinance are working for the City as *public* employees. Thus as stated by this Court in the above excerpt the Petitioners have "no grounds for complaint when the City favors its own

residents". The rational was alluded to by this Court in the following passage:

> Certainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause . . . Many, if not most, of our cases expounding the Privileges and Immunities Clause have dealt with the basic and essential activity . . . *Public employment, however, is qualitatively different from employment in the private sector;* it is a subspecies of the broader opportunity to pursue a common calling. *We have held that there is no fundamental right to government employment* for purposes of the Equal Protection Clause. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976) (per curiam). *Cf. McCarthy v. Philadelphia Civil Service Comm'n*, 424 U.S. 645, 47 L. Ed. 2d 366, 96 S. Ct. 1154 (1976) (per curiam) (rejecting equal protection challenge to municipal residency requirement for municipal workers.) *Id.* at 219. (Emphasis added.)

Although the decision in *United Building & Constr. Trades v. Camden* is clearly distinguishable from the case at bar since it involved *private* employees, it should nevertheless be noted that this Court did not strike down Camden's ordinance under the Privileges and Immunities Clause. It simply held that the Clause applied to the ordinance. The decision as to whether the ordinance violated the Clause was remanded to the New Jersey Supreme Court, but a decision was never rendered because the case settled.[15] *Id.* at 223. Thus Petitioners

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[15] Indeed this Court seemed to indicate that Camden's ordinance might survive the scrutiny of the Privileges and

have no precedent to support the proposition that even a municipal residency requirement in connection with public construction contracts violates the Privileges and Immunities Clause, much less precedent to support their position that a municipal residency requirement imposed on actual municipal employees providing traditional local government services violates the Clause.[16]

Also relevant to this inquiry are the many cases which have upheld municipal residency ordinances against challenges based upon the "right of interstate travel". *McCarthy v. Philadelphia Civ. Serv. Comm.*, 424 U.S. 645, 647, 96 S. Ct. 1154, 1155, 47 L. Ed. 2d 366 (1976); *Abrahams v. Civ. Serv. Comm.*, 65 N.J. 61, 319 A.2d 483 (1974); *Lines v. City of Topeka*, 223 Kan. 772, 779, 577 P. 2d 42 (1978); *Andre v. Village of Maywood*, 561 F.2d 48, 52-53

Immunities Clause. It distinguished Camden's ordinance from the "Alaska Hire" statute invalidated in *Hicklin, supra*, stating: "we invalidated the [Alaska Hire] Act as an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents. No similar "ripple effect" appears to infect the Camden ordinance. It is limited in scope to employees working directly on city public works projects." *Id.* at 223.

[16] Petitioners may attempt to rely on the unpublished opinion in *1st Westco Corp. v. School District of Philadelphia*, under docket no. 91-2727 in the United States District Court for the Eastern District of Pennsylvania (JA 145) and the case of *Neshaminy Constructors, Inc. v. Krause*, 181 N.J. Super. 376, 437 A.2d 733 (Ch. Div. 1981), *modified* 187 N.J. Super. 174, 453 A.2d 1359 (App. Div. 1982) cited therein; but both of those cases dealt with a law requiring state, not municipal residency and, as such, were not "limited in scope". See preceding footnote.

(7th Cir. 1977); and *Kansas City FOP v. Kansas City*, 620 F. Supp. 752, 755 (D. C. Kan. 1984). For certainly if municipal residency requirements do not interfere with the right of "interstate travel" they do not interfere with "interstate harmony". The two concepts seem related as even the earliest cases interpreting the purpose of the Privileges and Immunities Clause focus on "free ingress into other States, and egress from them . . . " *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357 (1869).

Finally, even if this Court were to reverse the decision of the lower Court and make new law by finding that an out-of-state resident's interest in employment opportunities with local governments in the process of providing traditional local governmental services "is sufficiently fundamental to the promotion of interstate harmony so as to fall within the purview of the Privileges and Immunities Clause",[17] Petitioners' cause must still fail. The second inquiry used by the Courts recognizes

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[17] This is exactly what Petitioners advocate in their Brief. Under Petitioners' theory all municipal residency ordinances would be subject to the Clause and each municipality throughout the country would have to defend its ordinance in a separate fact sensitive court proceeding. Petitioners characterize this result as rational compared to the "artificial distinction" resulting from the decision by both lower Courts that the Clause is inapplicable to traditional municipal residency requirements (Pb 13). Obviously the reverse is true, since the individual residency ordinances of various municipalities throughout the nation share common rationals and methods of implementation. This is particularly true in states like New Jersey where municipal residency ordinances are now facilitated by state enabling statutes which authorize such ordinances and require the ordinance to contain certain mandatory provisions (see N.J.S.A. 40A:9-1.3 to 40A:9-1.10).

that the Clause does not preclude distinctions based on residency where the governing body can demonstrate that "(i), there is a substantial reason for the difference in treatment; (ii) the discrimination practiced against non-residents bears a substantial relationship to the State's objective." *Piper*, 470 U.S. at 284; *United Building & Constr. Trades Council*, 465 U.S. at 222; *Hicklin*, 437 U.S. at 525-526.

This Court has stated that governmental units "should have considerable leeway in analyzing local evils and in prescribing appropriate cures." *Toomer v. Witsell, supra*, at 396, 92 L. Ed. 1460, 68 S. Ct. 1156. This caution is particularly appropriate when a governing body is merely setting conditions on the expenditure of funds it controls. See *United Building, supra*, at 221, 79 L. Ed. 2d, at 260.

In *United Building & Constr. Trades v. Camden, supra*, the Court summarized the test as follows:

> The inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. *Id.* at 222.

In the case of Salem's Ordinance, the reasons therefor are stated in its preamble (54a).[18] These reasons have

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[18] Contrary to Petitioners' assertions to the Third Circuit, the City did not fail to "demonstrate a substantial reason" for its Ordinance, nor did it fail to show that the Ordinance "furthers the achievement of [its] objectives". Petitioners assertion that "the City offered no support that its residency ordinance has resulted in actual benefits" is also unwarranted. These are merely Petitioners' characterizations. The District Court made no such findings. The fact is the City came forward with *prima*

sufficed to uphold municipal residency requirement ordinances against constitutional challenges based upon the Fourteenth Amendment which contains the same "privileges and immunities" reference as Article IV, Section II. See *Lorenz v. Logue*, 611 F.2d 421 at 423 (2d Cir. 1979).

Moreover, Petitioners' assertion that Salem's Ordinance is not "closely tailored" to the legitimate ends sought to be achieved is erroneous. The Ordinance requires all officers and employees to be residents and allows for exceptions only when specialized talent; the nature of the employment; or an employee's health is involved. It contained a "grandfather" clause to soften its immediate impact and yet achieve its goals through natural attrition. The fact that unemployed and unskilled residents receive no official preferences in the City's hiring practices is mainly a function of the New Jersey Civil Service merit examination system which governs the City's employment process.

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facia evidence on all these issues in support of the Ordinance, thereby shifting the burden to Petitioners. If the District Court had denied the City summary judgment the City most certainly would have been permitted to retain expert witnesses to conduct studies and analysis to support its arguments at trial.

CONCLUSION

For the foregoing reasons, Respondents contend that the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID J. PUMA, ESQ.
Council of Record
WATERS, SHERMAN & PUMA, P.A.
107 West Broadway
Salem, New Jersey 08079
(609) 935-2244
Attorneys for Respondents